75-1914

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. .....

JANE MONELL, et al.,

Petitioners,

—v.—

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA, and CAROL ABBEY, on their own behalf and in behalf of all others similarly situated, Petitioners

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, HENRY SMITH, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, IRVING ANKER, as Chancellor of the City School District of the City of New York, and ABE BEAME, as Mayor of the City of New York, Respondents,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Jane Monell, et al, pray that a writ of certiorari be issued to review the final judgment of the United States Court of

Appeals for the Second Circuit entered in the office of the clerk on March 8, 1976.

OPINIONS BELOW

The opinion of the District Court certifying this as a class action is reported at 357 F. Supp. 1051 (S.D.N.Y. 1972) and is reproduced as Appendix I, infra at A1-A14. The opinion of the District Court dismissing this action is reported at 394 F. Supp. 853 (S.D.N.Y. 1975) and is reproduced as Appendix II, infra at A15 - A27. The opinion of the United States Court of Appeals for the Second Circuit, reported at 532 F. 2d 259 (2d Cir. 1976) is reproduced as Appendix III, infra at A28 - A70.

JURISDICTION

The Second Circuit rendered its judgment affirming the order of the District Judge dismissing this action on March 8, 1976 and entered its order on the same date. An extension of time within which to file this petition to July 9, 1976 was granted by Mr. Justice Marshall on May 25, 1976. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Equal Employment Opportunity Act of 1972 extending the coverage of Title VII of the Civil Rights Act of 1964 to state and local officials and educational institutions should be applied in an action which had been brought prior to the effective date of the 1972 Act

and which was still pending on that date?

2. Whether local governmental officials and/or local independent school boards are "persons" within the meaning of 42 U.S.C. §1983 when equitable relief in the nature of back pay is sought against them in their official capacities?

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1871 §1; 42 U.S.C. §1983 (1970).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Equal Employment Opportunity Act of 1972, §2(1), §3; 42 U.S.C. §2000 e (a), §2000 e - 1.

Sec. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

Sec. 3. Section 702 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e-1) is amended to read as follows:

EXEMPTION

"Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

STATEMENT OF THE CASE

The plaintiffs in this action are women who were compelled by the defendants to take leaves of absence from their employment during their pregnancies. Defendants are the Mayor of the City of New York and its Commissioner of Social Services as well as the Board of Education of the City of New York and its Chancellor. The mandatory suspensions were invoked against all of the plaintiffs at varying times during 1971, A7-8, A41,* pursuant to separate but similar policies then pursued by the City of New York and the Board of Education. None of the plaintiffs have ever been

* References are to the Appendix in the Second Circuit unless otherwise indicated.

compensated for pay lost during their involuntary suspensions. In their original complaint, filed July 26, 1971, plaintiffs challenged, on constitutional grounds, the relevant regulations of each of the defendants. Jurisdiction was initially based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3), A1.

An amended complaint was filed on September 14, 1972, following the amendment to Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.)by the Equal Employment Opportunity Act of 1972 which extended the Civil Rights Act's coverage to state and local governments and boards of education, 14A. The plaintiffs then added Title VII both as a ground

for relief and as a source of jurisdiction.

In an opinion filed April 12, 1972, the District Court denied both defendants' motion to dismiss and plaintiffs' motion for summary judgment, but granted plaintiffs' motion to declare this a class action. The defendants subsequently abandoned their mandatory pregnancy rules. Plaintiffs' claims for equitable restitution, however, remained outstanding.

In the opinion and order dated April 30, 1974, Judge Metzner dismissed the complaint for lack of subject matter jurisdiction, Appendix II, infra. The Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I

In Holding That The Equal Employment Opportunity Act of 1972 Had No Application to A Case Pending At the Time of Its Enactment The Decision Below Conflicts With A Subsequent Decision of This Court.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000 e et seq was amended as of March 24, 1972 to include within its coverage "governments, governmental agencies [and] political subdivisions" as well as educational institutions, Pub. L. No. 92-261 § § 2(1), 3, "The Equal Employment Opportunity Act" (amending 42 U.S.C. § 2000 e (a)). In the instant case the Second Circuit held

that although the 1972 amendments brought local officials within the ambit of Title VII these amendments could not be applied to authorize relief on behalf of the plaintiffs, whose injuries occurred during 1971 but whose case was pending at the time of the amendments. This holding contravenes that of this Court in Brown v. General Services Administration, 425 U.S.___, 44 U.S.L.W. 4704 (1976), affirming 507 F. 2d 1300 (2d Cir. 1974).[1] There too the plaintiff was aggrieved in 1971 - prior to the effective date of the

1. The Second Circuit had also applied the 1972 amendments, retroactively in Brown v. G.S.A., supra. As will be shown, however, the purported distinction which allowed the Second Circuit to reach a different result in this case was erroneous under the Supreme Court's approach in Brown.

1972 amendments - but this Court found the amendments to be applicable, Brown v. General Services Administration, supra, 44 U.S.L.W. at 4705 n.4. The failure of the defendants in Brown to raise the question before this Court is not significant since the issue went to subject matter jurisdiction and this Court would, if such were lacking, have raised the point sua sponte and dismissed the action, compare Liberty Mutual Insurance Company v. Wetzel ____U.S.____, 44. U.S.L.W. 4350 (1976) (judgment of the Court of Appeals for the Third Circuit in a Title VII case dismissed sua sponte for want of appellate jurisdiction in the Court of Appeals).

Also indicative of the significance of the ruling in Brown, supra,

is this Court's disposition of Place v. Weinberger, 497 F. 2d 412 (6th Cir. 1974), cert. granted, judgment vacated and remanded ____U.S.____, 44 U.S.L.W. 3718 (1976), in which the Supreme Court remanded "for further consideration in light of Brown v. Government Services Administration, (sic) 425 U.S. ____, slip op. 3 n.4 (1976)." The sole question before the Court in Place v. Weinberger, supra, was the same question here at issue, i.e., whether the Equal Employment Opportunity Act of 1972 should be applied to a case pending as of its enactment, see summary of petition for certiorari, Place v. Weinberger, 74 - 116, 43 U.S.L.W. 3152 (1974).

Thus the vacatur and remand in Place not only demonstrates the sig-

nificance of footnote four in Brown, it also points the way to appropriate disposition of this petition: to grant the petition outright or to grant it, vacate the holding of the Second Circuit, and remand for reconsideration.

The Second Circuit was of the view that this case was distinguishable from Brown v. General Services Administration, supra, because the defendant there was an agency of the federal government whereas these defendants are municipal agents and an educational institution (App. III, A40). The Court thought that difference was important because it found - in a key error - that victims of federal discrimination enjoyed a right to back pay prior to 1972,

while victims of local discrimination did not, App. III, A40 - 42.

This Court's opinion in Brown v. General Services Administration, supra, shows that the Second Circuit was wrong. In Brown this Court held flatly:

> Until it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect federal employees. - Id at 425 U.S.____, 44 U.S.L.W. 4705.

Were this not clear enough the Second Circuit's error could also be demonstrated by reference to Congress' understanding of the status of federal employees prior to the 1972 amendments.[2] Since, then, the Equal

2. "Despite the series of executive and administrative directives on equal employment opportunity, Federal employees ... face legal obstacles in obtaining meaningful remedies ... Monetary restitution or

Employment Opportunity Act created new rights for state, local, and federal workers, the distinction the Second Circuit made below was improper. That decision is therefore as much in conflict with Brown v. General Services Administration, supra, as was the Third Circuit's decision in Place v. Weinberger, supra. It should be remanded for reconsideration in the light of Brown, supra and of the law governing back pay for federal officials prior to 1972.

Additional reason for granting the writ concerns the importance of the legal questions at stake: Are

2. back pay is not attainable." H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. (1971), 1972 U.S. Code Cong. & Admin. News 2137, 2160.

state and local employees entitled to less protection under Title VII, as amended, than federal employees, even when the statute in terms makes no distinction between them? More basically still, in what circumstances may a statute furthering basic civil rights be denied application to a pending case? This Court recognized the importance of such questions when it granted the writs in Intern'l Union Etc. Local 790 v. Robbins and Myers, Inc., No. 75-1264, cert. granted ____ U.S. ___, 44 U.S.L.W. 3608 (April 23, 1976) and Guy v. Robbins and Myers, Inc., No. 75-1276, cert. granted ____ U.S. ____, 44 U.S.L.W. 3608 (April 23, 1976), both of which concerned the retroactive effect of another aspect of the 1972 amendments,

i.e., the increase of the time for filing charges from 90 to 180 days. For similar reasons the writ here sought should also be granted. Alternatively, the decision below should be vacated and remanded for reconsideration.

II

In Holding That The Defendants Were Not "Persons" for the Purposes of a Back Pay Award Under 42 U.S.C. §1983 the Decision Below Conflicted With Decisions of Other Courts of Appeals.

On its face, 42 U.S.C. §1983 authorizes a decree in equity ordering defendants Abe Beame and Henry Smith to provide, in their official capacities, back pay to the plaintiffs here, for those defendants are clearly "persons", whether sued individually or in their official capacities.[3] In reading the statute against its plain language the Second Circuit relied, in essence, on Monroe

3. Defendants are not alleged to be liable in their individual capacities.

v. Pape, 365 U.S. 167 (1961) and City of Kenosha v. Bruno, 412 U.S. 507 (1973), which together establish that municipalities are not "persons" for the purpose of §1983. Neither of these cases proscribed suits against municipal officials, or against a local independent school board, however.

Moreover, in subsequent cases the Supreme Court has continued to treat §1983 as authorizing monetary relief against governmental officials sued in their official capacities.

Precisely on point is Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), in which the Court referred to the back pay award as "appropriate," 414 U.S. at 638.

The Court was there referring to the order in Cohen v. Chesterfield County School Board, 326 F. Supp. 1159, 1161 (E.D. Va., 1971). This was a companion to Cleveland Board of Education v. La Fleur, supra, in which defendants were the Chesterfield County School Board and its Superintendent. The result can be interpreted to mean that §1983 relief ordering back pay is authorized against local officials or against autonomous bodies of local government other than municipalities, or both. In the view of the Second Circuit, however, it meant neither, AIII, A42 - A70 .

This decision conflicts with that made in other circuits both as to the

amenability to suit of officials sued in that capacity and as to the amenability of school boards to §1983 suits.

This Court has already consented to review one of the cases presenting the latter issue, Mt. Healthy City School District Bd. of Ed. v. Doyle, 529 F. 2d 524 (6th Cir. 1975) cert. granted,_____U.S._____, 44 U.S.L.W. 3585 (1976) (No. 75-1278). There the Sixth Circuit apparently[4] held the defendant school board subject to liability under 42 U.S.C. §1983. The same result was reached in the Seventh and Eighth Circuits, see Aurora Education Assoc. East v. Bd. of Ed. of Aurora Pub. Schl. Distr.

4. The Sixth Circuit did not issue an opinion and the decision of the District Court is unreported.

No. 131, 490 F. 2d 431, 435 (7th Cir. 1973), cert. denied 416 U.S. 985 (1974), compare Hostrop v. Bd. of Jr. College Distr. No. 515 523 F. 2d 569, 576-577 (7th Cir. 1975), cert. denied ____U.S._____, 44 U.S.L.W. 3624 (1976) (defendant not a "person"). See also Keckeisen v. Independent School District 612, 509 F. 2d 1062, 1065 (8th Cir. 1975), cert. denied ____ U.S._____, 44 U.S.L.W. 3202 (1975).

Contrary results have been reached not only in the Second Circuit but in the Fourth and Fifth Circuits as well, Adkins v. Duval County School Board, 511 F. 2d 690, 693-696 (5th Cir. 1975); Singleton v. Vance County Board of Education, 501 F. 2d 429 (4th Cir. 1974).

A conflict also exists in the issue of whether local officials are liable to §1983 suits for monetary relief in their official capacities. In Burt v. Board of Trustees of Edgefield County School District, 521 F. 2d 1201, 1205 (4th Cir. 1975), the Fourth Circuit held that while the defendant school board was not a person for the purposes of §1983, the board members were such even for the purposes of a back pay award against them in their official capacities. This decision was adhered to in Thomas v. Ward, 529 F. 2d 916, 920-921 (4th Cir. 1975).

The Sixth Circuit has also taken a position in conflict with that adopted below, Incarcerated Men of

Allen County v. Fair, 507 F. 2d 281, 287-288 (6th Cir. 1974) (award of counsel fees against a sheriff sued in his official capacity.)

The Fifth Circuit, on the other hand, is in accord with the Second, see Muzquiz v. City of San Antonio, 528 F. 2d 499, 500 (5th Cir. 1976) (en banc), but see separate dissenting opinions of Judges Tuttle, Thornberry, and Godbold, Id. at 528 F. 2d 501-505.

The result in the present case illustrates the importance of the issues raised in this petition. Though petitioners were deprived of constitutional rights which this Court has included among "the basic civil rights of man," Cleveland Board of Education v. La Fleur,

414 U.S. 632, 640 (1974) the judiciary is, according to the Second Circuit, powerless to order those who violated their rights to recompense them. Though this is unfortunate for them as individuals, far more important is the impact of the holding on the status of constitutional rights in general, for, if plaintiffs right to compensation is eliminated so too will be defendants incentive to adhere to the Constitution and laws, see Albermarle Paper Co. v. Moody, ____ U.S. ____, 95 S. Ct. 2362, 2371 (1975).

As 42 U.S.C. §1983 offers protection against "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ..." (emphasis added) it is the

source of federal judicial protection against official acts violating rights to due process of law, Goss v. Lopez, ____ U.S. ____, 95 S. Ct. 729 (1975); to freedom of speech, James v. Board of Education, 461 F. 2d 566 (1972) cert. denied, 409 U.S. 1042 (1972); and to the equal protection of law, Sugarman v. Dougall, 413 U.S. 643 (1974). To forbid the federal judiciary to make whole the victims of illegal official conduct is therefore to attack a broad range of constitutional rights.

If this Court decides not to vacate and remand this case (or grant the writ) as suggested in Point I, supra, it is respectfully urged that the writ should be granted for the reasons urged in this point. Alter-

natively, the Court could defer consideration of the petition pending its decision in Mt.Healthy City School District Bd. v. Doyle, supra.

CONCLUSION

For all of the foregoing reasons this petition for writ of certiorari should be granted and the judgment in this case should be vacated and remanded for further proceedings.

Respectfully submitted,

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APPENDIX I

Jane MONELL et al., Plaintiffs,

v.

DEPARTMENT OF SOCIAL SERVICES OF the CITY OF NEW YORK et al., Defendants.

No. 71 Civ. 3324.

United States District Court, S. D. New York.

April 12, 1972.

Nancy Stearns, Center for Constitutional Rights, New York City, Oscar G. Chase, Brooklyn, N. Y., for plaintiffs.

J. Lee Rankin, Corp. Counsel, City of New York, by Victor P. Muskin, Asst. Corp. Counsel, New York City, for defendants.

Memorandum Opinion and Order
on Motion to Dismiss and
for Summary Judgment

MOTLEY, District Judge:

This is an action by female employees of the New York City Board of Education and the New York City Department of Social Services on behalf of themselves and other female employees in city agencies similarly situated. Plaintiffs challenge, on federal constitutional grounds, rules and regulations of the defendant city agencies which plaintiffs claim arbitrarily compel pregnant women employees to take unpaid leaves of absence when they desire to and are capable of continuing to work beyond the mandatory leave period.

The complaint alleges that in the case of pregnant female employees agency policy permits such employees to work

through the seventh month of pregnancy with the approval of the agency physician. However, under city-wide leave regulations pregnant female employees are permitted to work only until the completion of the fifth month of pregnancy, unless they receive agency medical approval and approval of the head of the agency involved (Complaint, para. 22, 26.) The only exception to the aforesaid policy obtains when the eighth month of pregnancy occurs during the last month of the school term (Complaint, para 28.) This, of course, applies only to women in the school system.

The primary constitutional claim is that the policy making unpaid leave mandatory at the end of the seventh month of pregnancy is arbitrary and

without medical foundation and therefore violates plaintiffs' rights to liberty and property and equal protection guaranteed them by the Fourteenth Amendment to the Constitution.

Defendants have moved to dismiss this action on the ground that 1) the court lacks jurisdiction of the subject matter; or 2) the complaint fails to state a complaint on which relief can be granted. The motion is denied.

Jurisdiction in this court is predicated solely on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the civil rights statutes.

(1) In moving to dismiss the action on jurisdictional grounds defendants relied upon the decision of the Second Circuit in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) and its progeny.

Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971); Canty v. Board of Education, 448 F.2d 428 (2d Cir. 1971). Defendants' claim is that the gravamen of the complaint--that plaintiffs have been deprived of the income they would have earned had they not been required to take maternity leave--is nothing more than a claim of injury to personal liberty which is dependent for its existence upon the infringement of a property right and, therefore, not a claim cognizable under the civil rights jurisdiction of this court. 28 U.S.C. § 1343(3).

In Eisen v. Eastman, the Second Circuit had held that jurisdiction under the Civil Rights Acts, Title 42 U.S.C. § 1983 and Title 28 U.S.C. § 1343(3), could not be predicated on a claim of

infringement of property rights. However, the Supreme Court in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1115, 31 L.Ed.2d 424 (1972) ruled that it "has never adopted the distinction between personal liberties and proprietory rights as a guide to the contours of § 1343(3) jurisdiction" and expressly rejected the distinction. The complaint, therefore, cannot be dismissed for lack of subject matter jurisdiction.

(2) Plaintiffs' equal protection claim is that the requirement that a woman employee take a leave of absence at an arbitrary period during her pregnancy discriminates against women generally, and pregnant women in particular, in violation of rights guaranteed by the Fourteenth Amendment, by placing

an unconstitutional limitation on their employment.

It is true, as plaintiffs claim, that equal rights for women is an idea whose time has come. As a result, the courts have begun to re-examine all sex based restrictions and to apply with increasing sensitivity the guarantee of equal protection of the laws to prohibit arbitrary sex discrimination. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (discrimination against unwed fathers with respect to custody of their children); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) discrimination against women in appointment to administration of estates); White v. Crook, 251 F.Supp. 401 (M.D. Ala.1966) (jury discrimination against women); United States ex rel.

Robinson v. York, 281 F.Supp. 8 (D.Conn. 1968) (unequal sentences for men and women); Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp 184 (E.D.Va.1970) (exclusion of women from state institution of higher education); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971) (exclusion of women from employment as bartenders); Perry v. Grenada Municipal Separate School District, 300 F.Supp. 748 (N.D.Miss.1969) (exclusion of mothers of illegitimate children from public schools).

(3) Discrimination against women in employment generally is now prohibited by national law. 42 U.S.C. § 2000e. Discrimination against pregnant women employees and in the application of disability benefits to pregnancies has

recently been prohibited by the Rules and Regulations of the Equal Employment Opportunity Commission. 37 Fed.Reg. 6837. An equal rights amendment to the Federal Constitution is making its way through the ratification process of the states. Sex legislation is thus automatically suspect. Reed v. Reed, supra.

Very recently two federal district courts relied upon the guarantee of equal protection to invalidate state maternity leave policies similar to those in the instant case. Cohen v. Chesterfield County School Board, 326 F.Supp. 1159 (E.D.Va.1971); Schattman v. Texas Employment Commission, 330 F.Supp. 328,331 (W.D.Texas 1971). The favorable decision in the Schattman case, however, was reversed by the Court of Appeals for the Fifth Circuit,

459 F.2d 32 (5th Cir. 1972) (Judge John Minor Wisdom, dissenting). The majority held that the compulsory maternity leave after the seventh month involved there was shown to be reasonable and rationally related to a permissible state purpose.

In Cohen v. Chesterfield County School Board, supra, women were required to take a leave of absence after the fifth month of pregnancy. There the court ruled: "The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment." (326 F.Supp. at 1161.)

The instant complaint, therefore, cannot be dismissed for failure to state a claim upon which relief may be granted.

(4) On the other hand, plaintiffs' motion for summary judgment cannot be granted. The central issue of fact is disputed. Plaintiffs claim that women are compelled in every case to leave in the seventh month of pregnancy, except when the eighth month of pregnancy occurs during the last month of the school term. On page 16 of defendants' brief on their motion they assert: "A teacher may continue working, however, until such time as her pregnancy condition interferes with the effective performance

of her duties. There is no arbitrary seven month rule." Defendants state in a letter dated March 28, 1972, addressed to the court, that their policy is that an "individualized medical judgment is made in each case accommodating the teacher's desires with its medical examiner's professional judgment as to her ability to deliver satisfactory performance with reasonable safety to herself."

In the Cohen case the court ruled that "since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor." (326 F.Supp. At 1160.) Whether the defendants would accept the medical judgment of the pregnant teacher's doctor and a waiver of any claim of liability against defendants, such as was

offered by one of the plaintiffs, is not at all clear. Whether defendants require other medically disabled persons to submit to the medical judgment of defendants' doctors as opposed to their own is also not clear.

Therefore, the plaintiffs' motion for summary judgment must be denied.

(5) Plaintiffs have also moved for an order designating the present action a class action. The motion is granted. Plaintiffs represent a class which is so numerous that joinder of all members is impractical. There are numerous women employees in the City of New York's many agencies. There are questions of law and fact common to the class. The claims of the instant plaintiffs are typical of the claims of other members of the class. This court finds that

plaintiffs will fairly and adequately protect the interests of the class. The action is further maintainable as a class action since the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and effective adjudication of the controversy. The court also finds all other criteria for determining whether a class action should be allowed met in this case. Rule 23, Fed.R.Civ.P.

So ordered.

APPENDIX II

UNITED STATES DISTRICT COURT,
S. D. New York.

No. 71 Civ. 3324

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA and CAROL ABBEY, on their own behalf and on behalf of all other similarly situated,
Plaintiffs.

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, JULES M. SUGARMAN, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York; and John V. Lindsay, as Mayor of the City of New York.
Defendants.

APPEARANCES

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METZNER, D.J.:

This action is brought by female employees of the New York City Board of Education (Board) and the New York City Department of Social Services (Department) on behalf of themselves and other female employees in city agencies similarly situated. Plaintiffs challenge, on constitutional grounds, the rules and regulations of the defendant city agencies which plaintiffs claim arbitrarily compelled pregnant employees to take unpaid leaves of absence when they desired to, and were capable of working beyond the mandatory leave period. Plaintiffs seek declaratory and injunctive relief and damages for back pay.

According to the allegations of the complaint, the individual defendants Sugarman, Scribner and Lindsay are sued

in their official capacities.

Jurisdiction is based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) (the civil rights statute and its jurisdictional counterpart), and 42 U.S.C. §2000(e), et seq. (Title VII, the Equal Employment Opportunity Act).

Judge Motley has previously determined that the suit may be maintained as a class action. 357 F. Supp. 1051 (1972).

Defendants have moved to dismiss the action or, in the alternative, for an order granting summary judgment. They also seek to vacate the order granting class action status to this suit or, in the alternative, to compel plaintiffs to pay for the class action notice if it is ruled that the action proceed as a class action.

Plaintiffs have cross-moved for summary judgment. The original complaint was filed on July 26, 1971 with the plaintiffs being Monell, an employee of the Department, and Terrall and Zapata employed by the Board. An amended complaint was filed on September 14, 1972, which added plaintiff Abbey, who was employed by the Board. The amended complaint was filed following the amendment to Title VII permitting actions against governmental agencies charged with discrimination in employment. The record shows that each of the four plaintiffs was directed to take maternity leave about a month before the date that their respective doctors would have ordered.

In the fall of 1971, the Department changed its maternity leave policy to provide that no woman need report her

pregnancy or take maternity leave as long as she is able to continue to perform her job and desires to do so. This policy change was ordered effective in all city agencies, including the Department, on January 19, 1972, by a directive from former Deputy Mayor Edward K. Hamilton.

The Board of Education of the City of New York similarly changed its bylaws effective September 1, 1973.

These changes, while made subsequent to the institution of this action, antedated the decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), which would hold the practices complained of here to be unconstitutional. Consequently, the claims for equitable relief by way of injunction or declaratory judgment are moot. See,

Galvan v. Levine, 480 F.2d 1235 1261 (2d Cir. 1973), cert. denied, 417 U.S. 966 (1974), Nieves v. Oswald, 496 F.2d 808,813 (2d Cir. 1974).

We are left then with claims for back pay covering the periods for which plaintiffs allege they could have worked after being forced to take maternity leave.

The holding in City of Kenosha v. Bruno, 412 U.S. 507 (1973) supports a ruling that an action under Section 1983 will not lie against either the Board or the Department for any relief. Plaintiffs place great reliance on Forman v. Community Services, Inc., 500 F.2d 1246, 1254 (2d Cir.1974), cert. granted, 43 U.S.L.W. 3403 (U.S. Jan. 21, 1975) (No. 647), as authority for the proposition that the Board is not immune to an

action under that section. That case is not in point since the statute creating the State Housing Authority specifically waived governmental immunity both as to the agency and the state.

Under the Eleventh Amendment which precludes any action by a citizen against a state, it has been held that a state officer sued in his governmental capacity may be enjoined from future action that may be violative of the Constitution. Edelman v. Jordan, 415 U.S. 651,664(1974); McMillen v. Board of Education of State of New York, 430 F.2d 1145,1148-49(2d Cir. 1970). However, the Court went on to hold that monetary damages, even if characterized as "equitable restitution," may not be awarded for past injury if they are to be paid from the state treasury. Such

an action runs afoul of the Eleventh Amendment. Edelman, supra, at 664-71. See also, Rothstein v. Wyman, 467 F.2d 226, 236 (2d. Cir. 1971), cert. denied 411 U.S. 921 (1973).

The same reasoning applies to the effort to recover pay in this 1983 action. Monroe v. Pape, 365 U.S. 167 (1961), holds that an action for damages may not lie directly against the municipality. This immunity cannot be circumvented by suing the mayor, the commissioner or the administrator in their official capacities. Any award that would be made would, in the last analysis, be paid by the City of New York. Patton v. Conrad Area School District, 388 F. Supp. 410, 417 (D.Del. 1975); Needleman v. Bohlen, 336 F. Supp. 741 745-46 (D. Mass. 1974); Hines v.

D'Artois, 383 F. Supp. 184, 189-90 (W.D. La. 1974); O'Brien v. Galloway, 362 F. Supp. 901, 905 (D. Del. 1973).

I reach this result fully aware that in Cohen v. Chesterfield County School Board, decided with Cleveland Board of Education v. LaFleur, supra, the district court had granted a judgment for back wages as well as equitable relief. The Court did not indicate the existence of any jurisdictional problems under 1983 either because a board of education was a defendant, as were individuals being sued in tneir official capacities, or because of the nature of the relief sought. This is in contrast to the sensitivity indicated by the Court in Kenosha, supra, where only municipalities were defendants and the Court on its own motion raised the

jurisdictional objection that Section 1983 did not create the right of action for any purpose against such defendants.

We turn now to the claim for relief under Title VII. Prior to March 24, 1972, governmental units were exempt from the operations of Title VII. On that date Public Law 92-261 was enacted which amended Section 2000e(b) so that Title VII relief was available to employees of such governmental units.

As indicated above, this complaint was filed in 1971. In Cleveland Board of Education, supra, at 638-39 n.8. the Court said:

> "At the time that the teachers in these cases were placed on maternity leave, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §2000e et seq., did not apply to state agencies and educational institution. 42 U.S.C. §§2000e(b) and 2000(e)-1. On March 24, 1972, however, the Equal Employment Opportu-

nity Act of 1972 amended Title VII to withdraw those exemptions. Pub. L. 92-261, 26 Stat. 103. Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. 29 CFR §1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future."

This expression of opinion by the Court is dispositive of the issue of retroactivity in this case. The amendment of the complaint by adding plaintiff Abbey does not change the result since the discrimination as to her occurred and was completed prior to the amendment of the statute. Place v. Weinberger, 6 E.P.D. 9010 (E.D.Mich. 1973), aff'd 497 F.2d 412 (6th Cir. 1974), cert. denied, 43 U.S.L.W. 3306 (U.S. Nov. 26, 1974).

The claim for relief pursuant to Title VII is dismissed.

The complaint is dismissed.

So ordered.

Dated: New York, N.Y.
April 30, 1975

CHARLES M. METZNER
U. S. D. J.

APPENDIX III

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 407-September Term, 1975

(Argued December 19, 1975
Decided March 8, 1976.)

Docket No. 75-7333

Jane Monell, Susan Terrall, Beverly Zapata and Carol Abbey, on their own benalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

-against-

Department of Social Services of the City of New York, Jules M. Sugarman, as Commissioner of the Department of Social Services; Board of Education of the City of New York; Harvey B. Scribner, as Chancellor of the City School District of the City of New York, and John V. Lindsay, as Mayor of the City of New York,

Defendants-Appellees.

Before:

Hays, Timbers and Gurfein,
Circuit Judges

Appeal from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, 394 F. Supp. 853, which dismissed plaintiffs' complaint, based on 42 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., alleging that the rules and regulations of the defendant city agencies which compelled pregnant employees to take unpaid leaves of absence before medical reasons required them to do so were unconstitutional and praying for injunctive and declaratory relief and back pay, to be awarded against the city agencies and the named defendants in their official capacities.

Affirmed.

Oscar Chase and Gregory Abbey, Brooklyn, New York (Nancy Stearns, Center for Constitutional Rights, New York, N.Y., of counsel), for Plaintiffs-Appellants.

L. Kevin Sheridan, New York, N.Y. (W. Bernard Richland. Corporation Counsel of the City of New York of counsel, for Defendants Appellees.

Gurfein, Circuit Judge:

This is an appeal by the plaintiffs from an order of the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, dismissing their complaint. 394 F. Supp. 853 (S.D.N.Y. 1975). The plaintiffs are female employees of the New York City Department of Social Services ("Department") and of the New York City Board of Education ("Board") suing on behalf of themselves and other female employees

in city agencies similarly situated. The essence of the complaint is that rules and regulations of the city agencies formerly compelled pregnant employees to take unpaid leaves of absence before medical reasons required them to do so, and that such rules and regulations were unconstitutional.

The defendants Sugarman, former Commissioner of the Department of Social Services, Scribner, former Chancellor of the City School District of the City of New York, and Lindsay, former Mayor, are sued in their official capacities (Amended Complaint P24). Jurisdiction is alleged under the Civil Rights Act, 42 U.S.C. §1983, and its jurisdictional counterpart, 28 U.S.C. §1343(3), as well as under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

Judge Constance Baker Motley had previously determined that the action could be maintained as a class action. 357 F.Supp. 1051 (S.D.N.Y. 1972).

The plaintiffs sought declaratory and injunctive relief and damages for "the deprivation of their right to be employed, including but not limited to wages lost." No amount of damages was alleged.[1] The defendants moved to dismiss the action, or in the alternative, for an order granting summary judgment. They also moved to vacate the order granting class action status,

1 Since there is no claim alleged under 28 U.S.C. §1331 and no allegation of the jurisdictional amount, we do not consider whether such a claim would lie. Cf. City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Brennan, J., concurring).

or, in the alternative, to compel the plaintiffs to pay for the class action notice if the action were allowed to continue as a class action. The plaintiffs cross-moved for summary judgment. Judge Metzner dismissed the complaint. 394 F.Supp. 853 (S.D.N.Y. 1975).

With respect to the requests for injunctive and declaratory relief, he noted that in the fall of 1971, the Department had changed its maternity leave policy to provide that no woman need report her pregnancy or take maternity leave as long as she is able to continue to perform her job and desires to do so. The policy change became effective on January 29, 1972. The Board of Education similarly changed its bylaws effective September 1, 1973. The judge therefore dismissed as moot

the claims for equitable relief by way of injunction or declaratory judgment. We agree that these claims are moot and accordingly affirm. See Nieves v. Oswald, 498 F.2d 802, 813-15 (2d Cir. 1974); cf. DeFunis v. Odegaard, 416 U.S. 312 (1974).

The District Judge also dismissed the claims for back pay covering the periods for which plaintiffs allege they could have worked after they were forced to take maternity leave on the ground that there was no subject matter jurisdiction for the award of back pay either under Title VII or under §1983. Judge Metzner determined that the 1972 amendment to Title VII, Pub. L. No. 92-261, §2(1) (amending Title VII §701(a), 42 U.S.C. §2000e(a)), which broadened the definition of "person" under the Act so

as to include "governments, governmental agencies [and] political subdivisions," could not be applied retroactively. He therefore dismissed the claim for relief pursuant to Title VII, since all the acts of discrimination claimed to have been committed against the named plaintiffs occurred before the 1972 amendment to Title VII. The court also concluded that any attempt to use §1983 as a basis of obtaining monetary relief against the named city officials in their official capacities would circumvent the decision of the Supreme Court in Monroe v. Pape, 365 U.S. 167 (1961), which held that municipalities cannot be sued for damages under §1983, and accordingly dismissed the claim for relief brought under that section.

Appellants contend that the court erred in dismissing the action for lack of jurisdiction under the Civil Rights Act (§1983) and in failing to give retroactive effect to the amendment of Title VII in 1972.

I

Appellants are correct in their contention that, under the Title VII amendment of 1972, municipalities and their subdivisions are employers within the meaning of the Act. They also correctly state that one of the remedies provided for violation of the Act is the award of back pay. Title VII §706(g), 42 U.S.C. §2000e-5(g). Back pay is specifically made "payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment

practice." Id. (emphasis added). There is no statutory warrant for such an award against a public official, however. Accordingly, so far as the Title VII claim is concerned, employees discriminated against may henceforth obtain an award of back pay against the city itself (but not against individual officials).

We must conclude, however, that the 1972 amendment to Title VII does not apply retroactively so as to permit an award of back pay against the city in this case. The same law, Pub. L. No. 92-261, section 2(1) of which amended the definition of "person" to include "governments, governmental agencies [and] political subdivisions," also struck out in section 3 the exemption for the employment of individuals

engaged in educational activities of nonreligious educational institutions. In Weise v. Syracuse University, 522 F. 2d 397, 410-11 (2d Cir. 1975), we met the question Title VII was applicable to discrimination occurring before the lifting of the exemption for educational institutions. We held that it was not retroactive, for it was "a statute creating new rights where none had previously existed." Judge Smith went on to note that "[t]he manifest injustice of such ex post facto imposition of civil liability is reflected in the general rule of construction that absent clear legislative intent statutes altering substantive rights are not to be applied retroactively. Greene v. United States, 376 U.S. 149, 160, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964); Farmington River

Power Co. v. Federal Power Commission, 455 F.2d 86, 90 (2d Cir. 1972); Herman Schwabe, Inc. v. United Shoe Machinery Corp., 274 F.2d 608, 610 (2d Cir.), cert. denied, 363 U.S. 811, 80 S.Ct. 1247, 4 L.Ed.2d 1153 (1960)." 522 F.2d at 411.

We see no valid ground for distinguishing the sex-discrimination claim in Weise from similar claims against the city or the Board of Education based upon a retroactive application of Title VII. Indeed, the Supreme Court in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639 n.8 (1974), expressed the view that the statutory amendments passed after the alleged discriminations in LaFleur had been committed "are, of course, inapplicable to the cases now before us."

In Brown v. General Services Administration, 507 F.2d 1300, 1304-06 (2d Cir. 1974), cert. granted, 421 U.S. 987 (1975), we did hold §717(c) of Title VII, 42 U.S.C. §2000e-16(c), to be retroactive. But this was merely a procedural section relating to federal employees which gave them a limited right to judicial review of Title VII claims before administrative remedies were exhausted. Similar administrative remedies had previously been available to enforce rights provided by Title VII. In the case of city employees, on the other hand, entirely new substantive rights were created by the amendment to Title VII. We are constrained to hold, as a consequence, that back pay may not be awarded against the city or the Board of Education under Title VII for dis-

crimination that occurred before the 1972 amendment. The argument that, as in Brown, there was already a substantive right not to be forced to take a maternity leave arbitrarily is not well-taken. To support their position, appellants cite Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1973), and Cleveland Board of Education v. LaFleur, supra. But these cases were not decided until 1973 and 1974, respectively. In any event, no remedy existed prior to 1972 by which appellants could secure monetary relief to compensate them for the alleged discrimination.[2]

2 See Weise v. Syracuse University, supra, 522 F.2d at 411 n. 23, where we noted that an Executive Order had prohibited discrimination by the University prior to 1972, but that plaintiffs could not be considered as having a substantive right to recover damages under that Executive Order since the Order

We are thus compelled to conclude that plaintiffs cannot maintain their action under the provisions of Title VII.

II

Alternatively, plaintiffs argue that their suit can be maintained under 42 U.S.C. §1983, which provides that any "person" who, under color of state law, deprives any citizen of his constitutional rights, "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Although the Supreme Court held in Monroe v. Pape, supra, 365 U.S. at 187-92, and in City of Kenosha v. Bruno, 412 U.S. 507 (1973), that municipalities are not "persons"

2 could be enforced only by the Department of Labor.

within the meaning of §1983, the appellants nevertheless argue that the city officials named in their complaint are "persons" for §1983 purposes, even though they are used in their official capacities for monetary relief. Furthermore, plaintiffs contend that the defendant Board of Education of the City of New York is itself a "person" and can be sued directly in its own right under §1983.

A.

It is common ground that a municipality is not itself a "person" under the Civil Rights Act, Monroe v. Pape, supra, 365 U.S. at 187-92; City of Kenosha v. Bruno, supra, and that a state or county is also not such a "person". See Moor v. County of Alameda, 411 U.S. 693, 699-700, 706 (1973);

Zuckerman v. Appellate Division, 421 F.2d 625, 626 (2d Cir. 1970); United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84, 86, (3d Cir. 1969); Williford v. California, 352 F.2d 474, 476 (9 Cir. 1965). By like token, a department of such government is not a "person", as is conceded by appellants here with respect to the Department of Social Services of the City of New York.

While appellants concede that the Department of Social Services, being a department of the city, is not itself a "person" under §1983, they argue, nevertheless, that the Board of Education is such a "person" and is therefore suable directly for back pay. Appellants argue that the Board of Education is an independent body and not merely an arm

of the city like the Department of Social Services.

When we consider so-called independent agencies of the state or city, we must recognize that not all have the same character, function or degree of independence. We know of no rule of thumb that may be deemed controlling on the question whether independent agencies are to be considered "persons" for the purposes of §1983.

Thus, the State University of New York is not a "person." Blanton v. State University of New York, 489 F.2d 377, 382 (2d Cir. 1973). The New York City Employees' Retirement System has been held not to be a "person." Surowitz v. New York City Employees' Retirement System, 376 F.Supp. 369, 371-72 (S.D.N.Y. 1974) (Pollack, J.). Nor

is the New York City Transit Authority. Sams v. New York State Board of Parole, 352 F.Supp. 296, 298-99 (S.D.N.Y. 1972) (Weinfeld, J.). On the other hand, the State Housing Finance Agency has been said to be a "person" within §1983, though in that case there was also jurisdiction over it under §17(a) of the Securities Act of 1933, 15 U.S.C. §77q (a), sovereign immunity having been waived.[3] Forman v. Community Services,

3 Though the definition of "person" in §3(a)(9) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(9), was more limited, and did not include governmental agencies until the 1975 amendment of §3(a)(9), the Securities Act of 1933 has always included in its definition of "person" "a government or political subdivision thereof." Securities Act of 1933 §2(2), 15 U.S.C. §77b(2). Since the Supreme Court reversed the holding of the Court of Appeals that a share in a cooperative housing project is a "security," it did not have to determine whether

Inc., 500 F.2d 1246, 1255 (2d Cir. 1974), rev'd on other grounds sub nom. United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) (for opinion below, see 366 F.Supp. 1117, 1120 (S.D.N.Y. 1973) (Pierce, J.)). We need not consider whether the State Housing Finance Agency is a "person" under §1983, for that agency is not before us.[4] To the extent that the

3 there was federal jurisdiction under §1983. See 421 U.S. at 846 n.11.

4 The State Housing Finance Agency was described, in the court's discussion of sovereign immunity, as one that "has the express authority to sue and be sued; it acts only as a credit or financing entity; it apparently has no power to take property in its own name or in the name of the State." 500 F.2d at 1256.

language of the Forman opinion may be read to imply that all "agencies" are persons under §1983, 500 F.2d at 1255, we are not bound by the broad nature of the generalization and we doubt that it was so intended.

We think that the Board of Education is no more a "person" than the State University, the City Employees' Retirement System or the City Transit Authority. While the Board of Education has certain independent powers to manage the school system, it performs a vital governmental function in so doing, and, significantly, while it has the right to determine how the funds appropriated to it shall be spent, see Divisich v. Marshall, 281 N.Y. 170, 173-74 (1939), it has no final say in deciding what its appropriations shall be.

All funds for use of the Board of Education must be appropriated by the city. Section 2576(5) of the New York Education Law provides that the Board of Education must prepare an annual estimate of its expenses for the ensuing fiscal year which shall be submitted to the Mayor. The statute further provides that if the amount requested in the estimate is above a certain sum, then the excess amount requested shall "be subject to such consideration and to such action by the Board of Estimate, the Council, and the Mayor as that taken upon departmental estimates submitted by the Mayor." Thus, the funds of the Board of Education are public funds appropriated for its use as if it were a department of the city government.

Furthermore, §2580 of the Education

Law provides that all public moneys appropriated to the use of the Board of Education shall be paid into the treasury of the city. Similarly, §2557 of the Education Law provides that the Board of Education shall take title to all of its real property in the name of the city. Thus, it is clear that the affairs of the New York City Board of Education are intimately connected with the city itself.

Appellants argue, however, that several Supreme Court and Second Circuit cases have held that a Board of Education is a "person" for purposes of §1983. They cite Cleveland Board of Education v. LaFleur, supra; Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), and Green v. Waterford Board of Education, supra. These cases

were actions brought under §1983 against Boards of Education, and were decided on their merits without any jurisdictional problem being perceived.

We do not find these decisions to be binding precedents. In none of the cases was the attention of the court called to the possible lack of subject matter jurisdiction. As the Supreme Court said in In re Nielsen, 131 U.S. 176, 184 (1889), "[i]f we have seemed to hold the contrary in any case, it has been from inadvertence." In point of fact, moreover, in every case individual defendants were named in addition to the Board of Education. In Cleveland Board of Education v. LaFleur, the other defendants designated as "et al." probably were school officials whose presence

conferred sufficient jurisdiction in any event.[5] In Lombard v. Board of Education, the principal of the school who recommended the discharge of Lombard was a named defendant. And in Green v. Waterford Board of Education, the Superintendent of Schools was named as a defendant. There was no discussion

5 The jurisdictional question was apparently so far from the central thought that neither the District Court opinion, LaFleur v. Cleveland Board of Education, 326 F.Supp. 1208 (E.D. Ohio 1971), nor the Court of Appeals opinion, 465 F.2d 1184 (6 Cir. 1972), mentions who the et al. defendants were. The District Court opinion in the companion case of Cohen v. Chesterfield County School Board, 326 F.Supp. 1159 (E.D.Va. 1971), does tell us that the Superintendent of Schools was an individual defendant though the members of the County School Board apparently were not. No question of subject matter jurisdiction appears to have been raised or discussed by the Supreme Court in either case.

of the issue in any of these cases and certainly no reasoned determination of it. Cf. City of Kenosha v. Bruno, supra, 412 U.S. at 512.

We hold that the Board of Education itself is not a "person" within the meaning of §1983 and that this court, accordingly, has no jurisdiction to award any relief against it under the Civil Rights Act.

B.

We must, however, consider appellants' claim that the officials named in their complaint may be sued in their official capacities under §1983 for damages, even though the money would have to come out of the city treasury.

There is no doubt that municipal and state officials, sued in their official capacities, are "persons" within the meaning of §1983 when they are sued

for injunctive or declaratory relief. See Wright v. Chief of Transit Police, slip op. 1561, 1562-63 (2d Cir. Jan. 15, 1976); Gresham v. Chambers, 501 F. 2d 687, 690 (2d Cir. 1974); Erdmann v. Stevens, 458 F.2d 1205, 1207-08 (2d Cir.), cert. denied, 409 U.S. 889 (1972). It is also true that individual officials who violate the civil rights of plaintiffs may be required to respond to damages for their tortious conduct out of their own pockets. Scheuer v. Rhodes, 416 U.S. 232, 238 (1974).[6]

6 In Scheuer, the Supreme Court treated the action for money damages as one "to impose individual and personal liability on the named defendants." It was only on this "favorable reading" that the action was held not to be barred by the Eleventh Amendment pursuant to Edelman v. Jordan, 415 U.S. 651 (1974)

In this case, unlike Scheuer, there are no allegations that the individual defendants acted outside the scope of their offices or in an arbitrary manner. The individual defendants are sued here solely in their official capacities.

Appellants would have us merge two discrete conceptions to award relief. They would have us entertain suit against the official who committed an unconstitutional act, without malice, solely ex officio, even though from the nature of the relief sought -- back pay -- an award must come out of the public treasury of the Board of Education.

Recognizing that the Eleventh Amendment, which bars suits against states in the federal courts, has no direct application to cities, see Edelman v. Jordan,

415 U.S. 651, 657, n. 12 (1974), we nevertheless find a compelling analogy from cases arising under the Amendment.

In the landmark case of Ex parte Young, 209 U.S. 123 (1908), the Supreme Court held that a state official threatening to enforce an unconstitutional state statute could be sued for injunctive relief despite his contention that he was merely a representative of the state and that, accordingly, a suit against him would be a suit against the state, which is barred by the Eleventh Amendment. The fiction upon which the Young decision is supported is that a suit against a state officer to restrain him from taking action in his official capacity is a suit against the individual officer and not against the state.

An action for money damages, as

distinct from a suit for injunctive relief, can hardly be said "not [to] affect the State in its sovereign or governmental capacity," 209 U.S. at 159, if the state is required to pay the judgment. And, in such case, the bar of the Eleventh Amendment applies, even though the named defendant is the official rather than the state. See Edelman v. Jordan, supra, 415 U.S. at 663; Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573, 577 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 462-64 (1945). See also Fitzpatrick v. Bitzer, 519 F.2d 559, 563-64 (2d Cir. 1975), cert. granted, 44 U.S.L.W. 3358 (U.S. Dec. 16, 1975) (No. 75-251); Wilkerson v. Meskill, 501 F.2d 297 (2d Cir. 1974). As the Court recently noted, "the doctrine

of Ex parte Young is of no aid to a plaintiff seeking damages from the public treasury." Scheuer v. Rhodes, supra, 416 U.S. at 238. The Court has established the principle, moreover, that in Eleventh Amendment cases "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding," and that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co. v. Department of Treasury, supra, 323 U.S. at 464.

There is no logical way to avoid a similar result when the damages which

are sought in a §1983 action will have to be paid by a city that was held not to be amenable to such an action in Monroe v. Pape, supra. As the legislative history recited by Mr. Justice Douglas demonstrates, municipalities were simply not to be subjected to damage suits under the Civil Rights Act. The fiction that permits equity relief under Ex parte Young loses its validity, as we have seen in the Eleventh Amendment cases, when the public body which is not amenable to suit is requested to pay the judgment. Just as the Congress which enacted the Eleventh Amendment in order to overrule Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), meant to protect the treasury of the states, so the Reconstruction Congress which enacted the Civil Rights Act sought to protect municipal treasuries. The mere

substitution of the name of the official for the name of the city in the complaint cannot be used as a subterfuge to circumvent the intent of Congress. Thus, we must consider the suit at hand to have been brought directly against the City and the Board of Education, which as we have seen, are not "persons" for purposes of §1983. We are therefore without jurisdiction to hear this suit.[7]

7 Our decision accords with the results reached by the numerous district courts that have considered the question. See Westberry v. Fisher, 309 F.Supp. 12, 18 (D. Me. 1970) (Gignoux, J.); Bennett v. Gravelle, 323 F.Supp. 203, 210-11 (D. Md.), aff'd, 451 F.2d 1011 (4 Cir. 1971), petition for cert. dismissed, 407 U.S. 917 (1972); Conway v. Alfred I. DuPont School District, 333 F.Supp. 1217, 1218-19 (D. Del. 1971), quoting Mathias v. New Castle County Vocational Technical School District, No. 4073 (D. Del. Sept. 22, 1971) (Stapleton, J.); Francis v. Davidson, 340 F.Supp. 351, 370 (D. Md.) (three-judge court) (Frank A. Kaufman, J.), aff'd mem., 409 U.S. 904 (1972); Hayes v. Cape Henlopen School District, 341 F.Supp. 823, 829 (D. Del. 1972); O'Brien v. Galloway, 362 F. Supp. 901, 905 (D. Del. 1973); Hahn v. Ingram, 362 F.Supp. 982, 985, (D. Del. 1973); Veres v. County of Monroe, 364 F.Supp. 1327, 1331 (E. D. Mich. 1973); Rochester v. Baganz, 365 F.Supp. 179, 183 (D. Del. 1973); Klein v. New Castle County, 370 F. Supp. 85, 91-92 (D. Del. 1974); Hines v. D'Artois, 383 F.Supp. 184, 189-90 (W.D. La. 1974); Needleman v. Bohlen, 386 F.Supp. 741, 745-46 (D. Mass. 1974); and Patton v. Conrad Area School District, 388 F. Supp. 410, 417 (D. Del. 1975).

(Footnote 7 continued)

To the extent that the court in Conway v. Alfred I. DuPont School District, supra, and in the later case of Boyce v. Alexis I. duPont School District, 341 F.Supp. 672, 674-75 (D.Del. 1972), indicated that damages could be recovered against individual defendants in their official capacities if it were established that the officials acted in bad faith, we believe that it erred and that it misinterpreted Judge Stapleton's opinion in the Mathias case. A finding of bad faith could result in a judgment against the officials in their individual capacities, but not in their official capacities.

In answer to all this, appellants contend that despite the logical implications of Monroe v. Pape, such grants of back pay have actually been upheld. They point out that in Cohen v. Chesterfield County School Board, the companion case to Cleveland Board of Education v. LaFleur, supra, in which the Supreme Court held mandatory pregnancy leave rules to be unconstitutional, the District Judge whose decision was ultimately affirmed had actually awarded back pay. 326 F.Supp. 1159, 1161 (E.D. Va. 1971). They rely on the statement of Mr. Justice Stewart that "[t]he District Court held that the School Board regulation violates the Equal Protection Clause, and granted appropriate relief." 414 U.S. at 638. They seize upon the word "appro-

priate" as a reasoned view of the Supreme Court that back pay, the relief awarded below, is "appropriate." We do not agree. The sentence quoted was merely part of the statment of facts in Mr. Justice Stewart's opinion. Certiorari was granted only "to resolve the conflict between the Courts of Appeals regarding the constitutionality of such mandatory maternity leave rules for public school teachers," id., and the discussion in the opinion nowhere adverts to the award of back pay. [8]

8 Appellants further rely on the case of Sugarman v. Dougall, 413 U.S. 634 (1973). They argue that the plaintiffs in Sugarman sued under §1983 for both injunctive relief and lost wages, and that neither the three-judge district court, Dougall v. Sugarman, 339 F.Supp. 906 (S.D.N.Y. 1971), nor the Supreme Court questioned the propriety under §1983 of the claim for damages.

(Footnote 8 continued)

While it is true that the amended complaint in Sugarman prayed that that the court "[g]rant each plaintiff damages of $10,000 as represented by lost earnings," this claim was apparently not pressed at trial. The District Court granted only injunctive and declaratory relief, and the Supreme Court was thus not faced with the issue of whether monetary relief against the named officials was permissible under §1983.

Another case relied on by plaintiffs is Calo v. Paine, 521 F.2d 411, 413 (2d Cir. 1975). In Calo we held that an action under §1983 could be brought against municipal officials who, as appears from the caption of the case in the district court, were sued both in their individual and their official capacities. Furthermore, as we noted, 521 F.2d at 412, the complaint asked both for equitable relief and for back pay and compensatory and punitive damages. We do not, however, interpret Calo as holding that city officials are considered "persons" for §1983 purposes even when they are being sued in their official capacities for damages, as we merely vacated Judge Blumenfeld's grant of summary judgment for the defendant and remanded the case for further proceedings. Since Judge Blumenfeld had not awarded any damages, we

(Footnote 8 continued)

were not required to consider whether a federal court has jurisdiction, in a proper case, to award such damages against city officials sued in their official capacities.

Similarly distinguishable is the case of Sterzing v. Fort Bend Independent School District, 496 F.2d 92 (5 Cir. 1974). The Sterzing court dealt on appeal only with the claim of the plaintiff that he was entitled to the equitable remedy of reinstatement. In remanding, the court stated that it expressed no view on what the remedy should be.

The other cases cited by plaintiffs in their brief are plainly distinguishable. In most of these cases either the defendants were sued in their individual, not their official, capacities, e.g., Ingraham v. Wright, 498 F.2d 248, 251-52 (5 Cir. 1974), or only injunctive relief was requested, e.g., Rochester v. White, 503 F.2d 263, 266-67 (3 Cir. 1974).

Plaintiffs also place reliance on Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6 Cir. 1974), which held that persons who were successful in obtaining an injunction against a county sherrif in his official capacity could be awarded attorneys' fees, to be assessed against the sheriff in his official capacity and paid out of public funds. That is not the same as awarding damages.[9]

9 See Thonen v. Jenkins, 517 F.2d 3, 7-8 (4 Cir. 1975), which noted that attorneys' fees are like costs of the action. Our analogous holding in Fitzpatrick v. Bitzer, supra, 519 F.2d at 571-72, may be reviewed by the Supreme Court, since a writ of certiorari has been granted. 44 U.S.L.W. 3358 (U.S. Dec. 16, 1975) (No. 75-251).

We note, in passing, that

We find ourselves in disagreement with the recent decision of a panel of the Fifth Circuit in Muzquiz v. City of San Antonio, 520 F.2d 993, 998-1001 (5 Cir. 1975), which held that individual members of the Firemen's and Policemen's Pension Fund of the City of San Antonio could be sued in their orficial capacities for monetary relief, despite the fact that any damages awarded would be paid out of the Pension Fund. We agree with the well-reasoned dissent

9 in Alyeska Pipeline Service, Inc. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court rejected the "private attorney general" rationale used to justify the award of attorneys' fees in Fair.

of Judge Godbold, 520 F.2d at 1007-10, that such a result would clearly contravene the jurisdictional bar to suits against muncipalities which the Congress that enacted the Civil Rights Act intended to establish.[10]

III

We think the result we have reached is sound both as a matter of policy and as a matter of logic. Yet, to a certain extent this conclusion may seem an anomaly. The Congress which enacted the 1972 amendment to Title VII appears not to have hesitated to impose direct

10 The Fifth Circuit has decided to have Muzquiz reheard en banc, along with its companion case of Warner v. Board of Trustees, 524 F.2d 1233 (5 Cir. 1975).

liability for damages against municipalities as employers for violation of the law against employment discrimination. But it did not see fit to make Title VII retroactive.

In the future, employees aggrieved by acts arising as a result of employment discrimination by a city will have direct redress from the city for back pay through the mechanism of Title VII without any need to rely on the Civil Rights Act.

On the other hand, if we try to adjust the grievances of the present plaintiffs by allowing the remedy of back pay under §1983 alone, we would be broadening the indirect remedy of damages generally against cities, which we are reluctant to do for reasons of precedent and concomitant

policy.

There is no claim for reinstatement here. The claim for back pay is not merely an adjunct of equitable relief. It stands simply as a claim for damages which cannot be distinguished from many other claims for violation of civil rights in actions which do not involve employment discrimination.

We accordingly affirm the decision of the District Court.

Supreme Court, U. S.
FILED
MAY 11 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1914

JANE MONELL, *et al.*,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI WAS TIMELY FILED JULY 2, 1976
CERTIORARI GRANTED JANUARY 25, 1977

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Relevant Docket Entries

7/26/71	Filed Complaint and issued Summons.
11/22/71	Filed Show Cause Order to Intervene and for a Preliminary Injunction of Carol Abbey.
11/26/71	Filed Order Denying Temporary Restraining Order. Bonsal, J.
11/30/71	Filed Affidavit of Victor P. Muskin in Opposition to Motion of Carol Abbey.
1/3/72	Filed Memorandum Endorsement on Show Cause Order denying Intervention and Preliminary Injunction. Ryan, J.
4/12/72	Filed Memorandum Opinion and Order Denying Motions to Dismiss and for Summary Judgment. Motley, J.
9/14/72	Filed Amended Complaint.
10/31/72	Filed Defendants' Answer to Amended Complaint.
4/22/74	Filed Defendants' Affidavit and Notice of Motion for an Order Dismissing Complaint under Rule 12(b) or Alternatively Granting Summary Judgment to Defendants.
5/29/74	Filed Plaintiffs' Affidavit and Notice of Motion for Summary Judgment.

9/23/74	Filed Report and Recommendation from Mag. Goettell.
4/30/75	Filed Opinion of Metzner, J. dismissing Complaint.
5/30/75	Filed Plaintiffs' Notice of Appeal to the United States Court of Appeals to the Second Circuit.
3/8/76	Filed Judgment of United States Court of Appeals for the Second Circuit.
4/5/76	Issued Mandate (Judgment and Opinion).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA and CAROL ABBEY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

-against-

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, JULE M. SUGARMAN, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York; and JOHN V. LINDSAY, as Mayor of the City of New York,

Defendants.

----------x

AMENDED COMPLAINT/CLASS ACTION
71 Civ. 3324

JURISDICTION

1. Jurisdiction over this action is invoked pursuant to 28 U.S.C. 1343(3) and (4) relating to actions under 42 U.S.C. 1981, 1983 and 2000e et seq. and the

Constitution of the United States, in particular the First, Ninth and Fourteenth Amendments.

2. Jurisdiction over this action is also invoked pursuant to 42 U.S.C. 2000e-5(f)(3) relating to actions under 42 U.S.C. 2000e et seq. (Title VII of the Civil Rights Act of 1964)

3. Plaintiffs' action for declaratory and injunctive relief and for damages is authorized by 28 U.S.C. 2201 and 2202, 42 U.S.C. 1981 and 1983 and by 42 U.S.C. 2000e-5(g).

CLASS ACTION ALLEGATIONS

4. Plaintiffs sue on their own behalf and on behalf of all others similarly situated pursuant to Rule 23(b)(c) and (3) of the Federal Rules of Civil Procedure. Defendants have acted on grounds generally applicable to the class, thereby

making appropriate final injunctive relief with respect to the class.

5. Plaintiffs represent, on information and belief, over one thousand women who are City employees, either of the Board of Education or the Department of Social Services, or other city agencies who have been, or will be arbitrarily compelled to take an unpaid leave of absence from their employment solely because of their pregnancy when they wished to and were physically capable of continuing to work. In bringing this action, these women are exercising their rights under the First, Ninth and Fourteenth Amendments to the United States Constitution, in particular, their rights to bear children and remain full, active and equal members of society without the arbitrary and capricious interference of their

employers. All of these women wish to make the private determination of when to terminate their employment because of their pregnancy without the arbitrary interference and unreasonable discrimination of City compulsory maternity leave policies which deprive them of their civil rights under color of law. The members of the class are so numerous that joinder of all of them is impracticable.

6. Plaintiffs are women who have already had their employment unconstitutionally terminated because of City policies of compulsory maternity leave, but sue on behalf of all other women, for whom questions of law and fact would be the same. Plaintiffs adequately and fairly represent all members of the class since all women city employees are, have been, or would be subject to the

unconstitutional policies of compulsory maternity leave.

7. Plaintiffs know of no conflicts of interest among the members of the class.

8. Plaintiffs claims are typical of the claims of the class.

9. There are questions of law and fact common to the class concerning whether Board of Education and Department of Social Services Policies as they relate to compulsory maternity leave for women employees are constitutional on their face and as applied by defendants in violation of the First, Ninth and Fourteenth Amendments.

10. The questions of law and fact common to the members of the classes predominate over any questions affecting only individual members. A class action is

superior to other available means for the fair and efficient adjudication of the controversy. Plaintiffs know of no interest of members of the class in individually controlling separate actions. Plaintiffs know of no difficulties likely to be encountered in the management of a class action.

PLAINTIFFS

11. JANE MONELL is a citizen of the State of New York and of the United States.

12. Until lawfully compelled to take a leave of absence because of pregnancy, Ms. Monell was employed as a Supervisor at the Bureau of Child Welfare, Department of Social Services of the City of New York.

13. SUSAN TERRALL is a citizen of the State of New York and of the United States.

14. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Terrall was employed by the Board of Education of the City of New York as a teacher of English as a second language in the Work Incentive Program for Adult Education. Prior to said involuntary leave of absence, Ms. Terrall had been employed as a teacher for 10 months in the Work Incentive Program with a junior high school provisional regular license.

15. BEVERLY ZAPATA is a citizen of the State of New York and the United States.

16. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Zapata was employed by the Board of Education of the City of New York as a teacher of basic education

courses in the Work Incentive Program. Prior to her compelled leave of absence, she had been employed as a teacher in the Work Incentive Program with a Regular Common Branches License.

17. Plaintiff, CAROL ABBEY is a citizen of the State of New York and the United States.

18. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Abbey was employed as an English teacher by the Board of Education of the City of New York at Junior High School 227.

Ms. Abbey has been a teacher at J.H.S. 227 since September 1967. She now holds a regular junior high school English license.

DEFENDANTS

19. DEPARTMENT OF SOCIAL SERVICES

OF THE CITY OF NEW YORK is a department of the city government under its charter, and is authorized to hire and grant leave to its employees subject to the by-laws of the City of New York and of the Department of Social Services.

20. JULE SUGARMAN is the Director of the Department of Social Services.

21. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK is a department of the city government which under its charter is charged with maintaining the public school system for the City. It is authorized to hire and grant leave to its employees subject to its by-laws.

22. HARVEY SCRIBNER is Chancellor of the New York City Board of Education.

23. JOHN LINDSAY is the Mayor of the City of New York.

24. Defendants are sued in their

official capacity.

25. On February 22, 1971, plaintiff Monell requested maternity leave to commence March 8, 1971, from her Supervisor, Ms. Sydnor. Her request was submitted with a letter from her personal physician, stating that her expected date of delivery was April 17, 1971.

26. On February 24, 1971, plaintiff Monell was informed she must leave work on Friday, February 26, 1971, as she was already in her eighth month of pregnancy.

27. On February 25, 1971, plaintiff Monell protested the forced termination date in a memorandum to Irving Damsky, Director, Department of Personnel, Bureau of Child Welfare, Department of Social Services. In this memorandum she requested that her leave be effective March 29, 1971, and further offered to

sign a waiver of liability and secure a note from her physician verifying her physical good health if permitted to continue to work. Receiving no reply to said memorandum, on February 26, 1971, Ms. Monell left work as directed.

28. On or about March 10, Ms. Monell received a letter from Inez Simon, Division of Personnel Relations, Department of Social Services, Bureau of Personnel Administration, re-confirming that her request to continue work until March 29, 1971, had been denied and indicating that the denial was based on a department policy permitting staff members to work through the seventh month of pregnancy with the approval of their Bureau Physician. The letter also noted that under city-wide leave regulations pregnant employees are permitted to work only until

the completion of the fifth month of pregnancy unless they receive "agency medical approval" and approval of the head of the agency by whom they are employed. [See letter, Appendix A annexed to the original complaint and made a part hereof.]

29. In January 1971, plaintiff Susan Terrall requested maternity leave to commence on April 1, 1971, from her then supervisor Ms. Vilma Alverez. Her request was accompanied by a note from her obstetrician, Dr. Leonard Elmaleh stating that she could work until April 1, 1971. In establishing the date of April 1, Dr. Elmaleh, indicated to plaintiff Terrall that there was no medical reason why she could not work as long as she wished. Plaintiff Terrall indicated she wished to work until April 1. Plaintiff Terrall's expected date of delivery was April 22,

1971. When plaintiff Terrall was transferred from the San Juan Center to St. Anselm's School her request was transferred to her new supervisor, Murray Liebman.

30. During the second week in January 1971, plaintiff Beverly Zapata requested maternity leave to commence on April 1, 1971, from her supervisor, Murray Liebman. Her request was accompanied by a note from her obstetrician, Dr. Eulogio Jerez stating she could work until March 15, 1971. Dr. Jerez indicated to plaintiff Zapata without further explanation that he had chosen the March 15th date for "legal" not medical reasons. The note indicated that plaintiff Zapata's expected date of delivery was April 11, 1971.

31. Plaintiffs Terrall and Zapata

were told by Mr. Liebman that they must have a physical examination done by the Board of Education Physician.

32. On March 1, 1971, they went to the Board of Education on Court Street, Brooklyn, New York, as directed. At the physical examination their blood pressure was taken, the doctor felt the size of their babies and noted the due dates indicated by their obstetricians. The Board of Education doctor then informed plaintiffs Terrall and Zapata that since they were past their seventh month of pregnancy they were supposed to stop work immediately but that they could complete the week.

33. Plaintiffs Terrall and Zapata both worked until March 5, 1971.

34. On September 10, 1971, the first day of the fall 1971 school term,

plaintiff Abbey informed Jacob Gore, the principal of J.H.S. 227 that she was pregnant and would take maternity leave before the end of the term.

35. Mr. Gore stated that if Ms. Abbey were an incompetent teacher she would have been asked to leave on September 10th, but that since Ms. Abbey was not an incompetent teacher she could continue at her job.

36. On November 11, 1971 Mr. Gore asked Ms. Abbey when she expected to begin her maternity leave. Ms. Abbey informed Mr. Gore that with her physician's advice and consent, she was physically able to continue teaching until January 3, 1971 and that she wished to do so.

37. On November 12, 1971 Ms. Abbey received a letter from Mr. Gore instructing

her to report to the Medical Division of the Board of Education "for a consultation and/or examination."

38. On November 16, 1971 Ms. Abbey reported to the Medical Division for a "consultation and examination," conducted by Dr. Sathmary, a Board of Education physician.

39. Dr. Sathmary informed Ms. Abbey that inasmuch as she had completed her seventh month of pregnancy she could no longer teach. She stated that it was the policy of the Board of Education that once a teacher passed her seventh month of pregnancy, maternity leave was mandatory and no exceptions could be made.

40. Dr. Sathmary took Ms. Abbey's blood pressure and felt her abdomen. She stated that Ms. Abbey was in fine health and that her condition was normal.

41. Ms. Abbey informed Dr. Sathmary that she felt fine and was desirous of continuing her teaching duties. Ms. Abbey's personal physician, Dr. Jere Faison, specializing in obstetrics and gynecology, based on his continuing and recent examination of Ms. Abbey, approved her continuing in her teaching duties until January, 1972. This recommendation was conveyed to Dr. Sathmary.

42. Dr. Sathmary stated that the recommendations of Ms. Abbey's physician would make no difference regarding the question of Ms. Abbey's teaching beyond her seventh month because the policy of the Board of Education did not permit it. Dr. Sathmary stated that the physicians' letters were only used to verify how long a teacher has been pregnant. Dr. Sathmary told Ms. Abbey that she had to begin her

leave of absence November 29, 1971.

43. Subsequent to the filing of the original complaint in this action, Title VII of the Civil Rights Act of 1964 (42USC 2000e-(a) was amended to cover municipalities, which were previously exempt. Within the statutory period therefore, all named plaintiffs duly filed a discrimination complaint with the Equal Employment Opportunity Commission. Prior to such filing plaintiffs Monell, Terrall and Zapata duly filed discrimination complaints with the New York City Commission on Human Rights. Plaintiff Abbey was advised by the City Commission that the pendency of this instant action, prevented the City Commission from assuming jurisdiction of her complaint.

44. On information and belief the policy of the BOARD OF EDUCATION requires

that pregnant employees stop work at the completion of the seventh month of pregnancy.

45. On the information and belief the only exception to that policy occurs when the eighth month of pregnancy occurs during the last month of the school term. Under those circumstances the employee may work until the end of the term. On information and belief this arbitrary policy is purely for the convenience of the BOARD OF EDUCATION and in no way relates to the need of the employee.

46. The policies of defendants in arbitrarily requiring plaintiffs to stop work at the completion of their seventh month of pregnancy are in violation of plaintiff's right to liberty and property guaranteed under the Fourteenth Amendment.

47. The policies of defendants in

arbitrarily requiring plaintiffs to stop work at the completion of their seventh month of pregnancy discriminate against plaintiffs on basis of their sex in that the policies are wholly without medical basis and establish arbitrary limits on the employment of pregnant women in violation of their rights under the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution.

48. The policies of defendants in arbitrarily requiring plaintiffs to stop work at the completion of their seventh month of pregnancy violates plaintiffs' rights to have and raise a family without the imposition of unconstitutional conditions by defendants as guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution.

49. The policies of defendants in arbitrarily requiring plaintiffs to stop work at the completion of their seventh month of pregnancy chill and deter and discourage plaintiffs in the exercise of their rights under the First, Ninth, and Fourteenth Amendments to have and raise a family.

50. Plaintiffs were arbitrarily compelled to take unpaid leaves of absence from their employment solely because of their pregnancy; such compelled leave having no relationship to their ability to satisfactorily perform their jobs.

51. In compelling plaintiffs to take such leave, defendants are arbitrarily and capriciously depriving plaintiffs of their right to bear children and remain full, active and equal members of society. The

aforesaid actions of defendants acting under color of state law will deprive plaintiffs and the class they represent of their civil rights.

52. The aforesaid policies and actions of the defendants violate Title VII of the Civil Rights Act of 1964. (42 U.S.C. 2000e et seq)

53. If plaintiffs are not granted the relief they request immediate and irreparable harm will befall not only the plaintiffs, but all others who are chilled and deterred from exercising their constitutionally protected rights to have and raise a family.

54. Plaintiffs have no adequate remedy at law.

RELIEF

WHEREFORE, plaintiffs pray that this Court grant the following relief:

1. That a declaratory judgment issue declaring that the policies of defendants Department of Social Welfare and Board of Education compelling female employees to take a leave of absence at the completion of their seventh month of pregnancy are unconstitutional and in violation of:

(a) the right to earn a livelihood, to be full and active members of the society and to decide whether to have children guaranteed by the Fourteenth Amendment to the Constitution;

(b) the right to the equal protection of the laws guaranteed by the Fourteenth Amendment;

(c) the right to have and raise a family without the imposition of unconstitutional conditions guaranteed by the First, Ninth and Fourteenth Amendments.

(d) Title VII of the Civil Rights

Act of 1964 (42 U.S.C. 2000e et. seq.)

2. That an injunction issue prohibiting and enjoining defendants, their agents, employees, attorneys or any other person active on their behalf, from further enforcing the aforesaid policy requiring employees to take a leave of absence at the completion of their seventh month of pregnancy.

3. That an order be entered: a) Awarding plaintiffs and their class damages plus interest for the deprivation of their right to be employed, including but not limited to wages lost by reason of the discriminatory acts herein alleged and measured from the dates of those discriminatory acts.

b) Awarding costs and attorneys fees in the prosecution of this action.

c) Granting such other and further

relief as this Court may deem just, proper and equitable.

Respectfully submitted,

Nancy Stearns by Gregory Abbey

Nancy Stearns
Oscar G. Chase
Gregory Abbey, of Counsel

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588 Ninth Avenue
New York, N.Y. 10036
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(caption omitted for printing)

ANSWER

71 Civ. 3324

Defendants, by their attorney, NORMAN REDLICH, Corporation Counsel of the City of New York, answering the amended complaint herein, respectfully allege:

1. They deny each and every allegation set forth in paragraphs "1" and "2" of the amended complaint, except admit that jurisdiction of this court exists under 42 U.S.C. §1983 and 28 U.S.C. §1343 (3) as determined by this Court in its decision and order of April 12, 1972.

2. They deny each and every allegation set forth in paragraph "3" of the amended complaint except admit that this action is authorized by the Federal Civil Rights Act 42 U.S.C. §1981, 1983 and the

Declaratory Judgment Act, 28 U.S.C. §2201 et seq.

3. They deny each and every allegation set forth in paragraph "5" of the amended complaint except admit that the numbers of the class are so numerous as to make joinder impracticable.

4. They deny each and every allegation set forth in paragraph "6" of the amended complaint except admit that plaintiffs sue on behalf of a class and that this Court determined on April 12, 1972 that plaintiffs can fairly and adequately represent such class.

5. They lack knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraphs "7", "8" and "10" of the amended complaint except admit that in its decision and order of April 12, 1972,

this Court determined that this action is properly maintainable as a class action.

6. They deny each and every allegation set forth in paragraph "12" of the amended complaint except admit that plaintiff Monell has been placed on maternity leave from her employment with the New York City Department of Social Services.

7. They deny each and every allegation set forth in paragraphs "14, "16" and "18" of the amended complaint which alleges that plaintiffs TERRALL, ZAPATA and ABBEY were unlawfully placed on leave from their respective positions with defendant Board of Education.

8. They deny each and every allegation set forth in paragraph "19" of the amended complaint except admit that defendant DEPARTMENT OF SOCIAL SERVICES is an agency of the City of New York within

said City's Human Resources Administration, and, as such, is empowered to grant leave to its employees pursuant to the "City-wide Leave Regulations for Employees Who Are Under the Career and Salary Plan."

9. They deny each and every allegation in paragraph "20" of the amended complaint except admit that Defendant JULE M. SUGARMAN is the Commissioner of the New York City Department of Social Services.

10. They deny each and every allegation set forth in paragraph "21" of the amended complaint except admit that Defendant BOARD OF EDUCATION OF THE CITY OF NEW YORK is a body corporate established pursuant to the Education Law of the State of New York and possesses such powers and duties as defined therein, and

further admit that said defendant has established by-laws governing the granting of leave to its employees.

11. They deny each and every allegation set forth in paragraph "22" of the amended complaint, except admit that Defendant HARVEY B. SCRIBNER is the Chancellor of the City School District of the City of New York.

12. They deny each and every allegation set forth in paragraph "26" of the amended complaint except admit that Plaintiff MONELL was placed on maternity leave commencing on Monday, March 1, 1971, as she was already in her eighth month of pregnancy, and that, accordingly, her last full working day prior to the commencement of such leave was February 26, 1971.

13. With respect to the allegations set forth in paragraph "28" of the amended

complaint, they respectfully state that the city-wide leave regulation referred to has been superseded by Personnel Order No. 36/72 dated August 25, 1972, a copy of which is appended hereto.

14. They lack knowledge or information sufficient to form a belief as to the truth of each and every allegation set forth in paragraph "29" of the amended complaint, except admit that plaintiff TERRALL requested maternity leave to commence April 1, 1971, and submitted to the Board of Education a note from L. Elmaleh, M.D. dated January 7, 1971 indicating an expected date of confinement of April 22, 1971 and that plaintiff could work until April 1, 1971; and further admit that plaintiff was transferred to a new school prior to the commencement of her maternity leave. A copy of said note is annexed to

the affidavit of Sidney Leibowitz, M.D., sworn to October 21, 1971, and previously submitted to this Court.

15. They lack sufficient knowledge or information to form a belief as to the truth of each and every allegation set forth in paragraph "30" of the amended complaint except admit that a note from Eulogio Jerez, M.D., dated 2/5/71, was submitted to the Board of Education which stated that plaintiff Zapata could continue to work until March 15, 1971 "provided her pregnancy continues uneventful and she is checked periodically." A copy of this note is annexed to the affidavit of Sidney Leibowitz, M.D., dated October 21, 1971, and previously submitted to this Court.

16. They lack sufficient knowledge or information to form a belief as to the truth of each and every statement in

paragraph "32" of the amended complaint which alleges that "The Board of Education doctor then informed plaintiffs Terrall and Zapata that since they were past their seventh month of pregnancy they were supposed to stop work immediately but that they complete the week."

17. They lack sufficient knowledge or information to form a belief as to the truth of each and every allegation set forth in paragraphs "34", "35", "36", and "37" of the amended complaint.

18. They lack sufficient knowledge or information to form a belief as to the truth of each and every allegation set forth in paragraphs "39" and "42" of the amended complaint, except deny that the alleged statements set forth therein represent the policy of the Board of Education.

19. They lack sufficient knowledge or information to form a belief as to the truth of each and every allegation set forth in paragraph "40" of the amended complaint which purports to represent an oral statement made by Dr. Sathmary to plaintiff Abbey.

20. They lack sufficient knowledge or information to form a belief as to the truth of each and every allegation set forth in paragraph "41" and "42" of the amended complaint.

21. They lack sufficient knowledge or information to form a belief as to the truth of each and every allegation set forth in paragraph "43" of the amended complaint, except admit that the Civil Rights Act of 1964 has been amended to cover municipalities during the pendency of this action and respectfully refer the

Court to the full text of said statute for a statement of the meaning and force thereof.

22. They deny each and every allegation set forth in paragraphs "44", "45", "46", "47", "48", "49", "50", "51", "52", "53" and "54" of the amended complaint.

FOR A FIRST DEFENSE,
DEFENDANTS ALLEGE:

23. The complaint fails to state a claim upon which relief can be granted.

FOR A SECOND DEFENSE,
DEFENDANTS ALLEGE:

24. On August 25, 1972, the Mayor of the City of New York issued Personnel Order 36/72, superseding the previous City-wide Leave Regulations governing maternity leave. (See Appendix). Pursuant to said personnel order, maternity leave commences "upon request and reasonable notification by the employee of her intent to take such

eave."

25. Personnel Order 36/72 applies to the New York City Department of Social Services.

26. By reason of the foregoing, this action is moot with respect to the New York City Department of Social Services.

WHEREFORE, Defendants respectfully request judgment dismissing this action with costs, or, in the alternative, declaring their maternity leave policies to be valid and constitutional in all respects.

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Corporation Counsel

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Dated: New York, N.Y.,
October 31, 1972.

APPENDIX

The City of New York
Office of the Mayor
New York, N.Y. 10007

Personnel Order No. 36/72 August 25, 1972

TO THE HEADS OF ALL AFFECTED CITY DEPARTMENTS AND AGENCIES:

Subject: Amendment to the Leave Regulations for Employees Who Are Under the Career and Salary Plan

By virtue of the powers in me vested by the New York City Charter, Section 5.0 of the "Leave Regulations for Employees Who are Under the Career and Salary Plan" is hereby amended. The enumeration of particular benefits herein is not intended to exclude the application of rights and benefits contained in other provisions of said Leave Regulations nor to limit existing benefits pursuant to collective bargaining agreements. Effective September 1, 1972, the aforementioned Section 5.0

shall read as follows:

5.0(a) Maternity leave of absence shall be granted to pregnant permanent employees for a period of up to 12 months. Such leave shall commence upon request and reasonable notification by the employee of her intent to take such leave. Upon application of the employee, such leave may be extended by the agency head for an additional period not to exceed one year. Total leave for this purpose shall not exceed 24 months.

5.0(b) Maternity leave of absence shall be granted to pregnant non-permanent employees for a period of up to 12 months. Such leave shall commence upon request and reasonable notification by the employee of her intent to take such leave. Upon application of the employee, such leave may

be extended by the agency head for an additional period not to exceed one year. Total leave for this purpose shall not exceed 24 months. During such period the agency head may terminate her employment because of business necessity or by the operation of law.

5.0(c) A pregnant permanent employee who is on leave of absence from her permanent position and has a non-permanent appointment to a higher position shall be granted concurrent leaves of absence from both positions pursuant to Section 5.0(a) and 5.0(b). The leave from the non-permanent position may be terminated as provided in 5.0(b) without affecting the leave from her permanent position.

5.0(d) Where a pregnant employee has an accrued sick leave and/or annual leave

balance, she shall be continued in pay status for a period of time equal to her accrued sick leave balance plus her accrued annual leave balance. Such time in pay status is included within the 12-month maternity leave period.

The Director of the Budget, the City Personnel Director, and all other officers or agencies of the City having any jurisdiction over the matters provided in this order are hereby requested, pursuant to the powers vested in them, to take the steps necessary to effectuate the provisions of this order.

John V. Lindsay
M a y c r

Supreme Court, U. S.
FILED
DEC 3 1976
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1914

JANE MONELL, et al.,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

ANSWER TO PETITION FOR CERTIORARI

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INTRODUCTION

The petition for certiorari presses upon this Court three questions for resolution:

1. Should the 1972 amendments to Title VII of the Civil Rights Act of 1964, bringing within the coverage of that act

state and local governments and educational institutions, be retroactively applied to allow an award of damages for acts of discrimination alleged to have been committed by such entities prior to enactment of the 1972 amendments?

2. Is the New York City Board of Education, which is a body politic and corporate separate from the City of New York, but funded by the City, a "person" within the meaning of 42 U.S.C. § 1983?

3. In an action brought pursuant to 42 U.S.C. § 1983 can damages for unlawful discrimination be recovered from governmental entities otherwise immune from suit under § 1983 by the device of naming as defendants governmental officials sued only in their official capacities, and the additional device of characterizing such relief as merely "equitable" in nature?

ARGUMENT

The petition for certiorari presents interesting theoretical questions relating to possible retroactive application of the 1972 amendments to Title VII and, assuming arguendo the inapplicability here of Title VII, the reach of § 1983. However, to the extent that shortly Title VII will furnish the guide to decision in most cases of this sort, it may be questioned that this is an appropriate case for the grant of a writ of certiorari. This consideration, essentially independent of the merits of this controversy, but rather having to do only with this court's view as to the proper exercise of its certiorari jurisdiction, we believe must be mentioned. We do not presume to suggest how such discretion should be exercised. We discuss below the substantive merits of petitioners' claims of error.

(1)

With respect to petitioners' argument here for retroactive application of the 1972 amendments to Title VII to allow recovery of damages against a municipality for conduct theretofore not prohibited by Title VII, we would point out initially that re-

troactive application of these amendments would operate unjustly. Cf. Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974).

This Court has itself recognized that maternity leave regulations represent a "good faith attempt to achieve a laudable goal." Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 648 (1974). And there is no suggestion here that these mandatory maternity leave regulations were adopted for anything other than the most laudatory of motives. All that the award of damages in this case would achieve would be a windfall recovery against a municipality which, prior to the 1972 amendments to Title VII, and without the guidance furnished by this Court's LaFleur decision, attempted to act reasonably, without any warning being furnished to such municipality of its possible

liability by reason of its concern for the welfare of its employees.

In their petition, in arguing for retroactive application here of Title VII, which might allow a back pay award against the City of New York and its Board of Education (we do not concede the appropriateness of such an award here even under a retroactive application of Title VII), petitioners place primary reliance upon footnote 4 of this Court's decision in Brown v. General Services Administration, _____U.S._____, 96 S. Ct. 1961, 1964 n. 4 (1976), where this Court stated that it "ha[d] no occasion to disturb" the holding of the Court of Appeals for the Second Circuit, there acquiesced in by the parties (see, id.), that in that case Title VII could be applied retroactively to allow Title VII relief to vindicate a

pre-existing prohibition against federal employment discrimination. (They also rely upon the disposition in Place v. Weinberger, _____U.S. _____, 96 S. Ct. 2643 (1976), remanding that case, likewise involving alleged federal employment discrimination, for reconsideration in light of Brown, with a citation to footnote 4 of the Brown opinion.)

However, as the Court of Appeals noted in its decision in the instant case (see Petition, A40-A41), what was before the Court in Brown had to do merely with the availability of a judicial remedy where there was already an administrative remedy against the employer, not the creation of any new substantive rights. On this ground alone, we believe retroactive application here of Title VII would be manifestly unjust.

In addition, we would also point out, in connection with the question of the justness of such retroactive application of Title VII, that what is involved here is not a question of discriminatory purpose, but rather a problem of a "good faith attempt to achieve a laudable goal" (Cleveland Bd. of Ed. v. LaFleur, supra, 414 U.S., at 648) being revealed by later judicial analysis to operate too broadly. Under such circumstances, it can only offend ordinarily accepted standards of justice to allow retroactive application of legislation such as the 1972 amendments to Title VII, and we believe this Court has already indicated its agreement with this view. See Cleveland Bd. of Ed. v. LaFleur, supra, 414 U.S., at 638-639 n. 8; see also, Washington v. Davis, _____

U.S. _____, 96 S. Ct. 2040 (1976), pointedly declining to retroactively apply Title VII standards of review of official acts in an action brought pursuant to 42 U.S.C. § 1981, where again there was no question of discriminatory purpose, and the governmental action which was attacked was clearly taken for a laudable purpose.

In this country over the past generation there has occurred a revolution in the field of civil rights, and this has been a most welcome revolution. But at the same time this Court has indicated in construing the reconstruction era civil rights statutes a sensitivity to both "common law tradition" and considerations of "public policy" (see, e.g., Wood v. Strickland, 420 U.S. 308, 318 ([1975]), and, in considering retroactive application of later civil rights statutes, it has considered the justness of such ap-

plication (see Bradley v. School District of Richmond, supra, 416 U.S., at 711), all of which, we believe, counsels against retroactive application in a case such as this of the 1972 amendments to Title VII. Compare Schaefer, Precedent and Policy, 34 U. of Chi. L. Rev. 3, 14-18 (1966).

There is not the slightest hint here that these maternity leave regulations were promulgated in anything other than a good faith effort to protect women employees and their unborn children, and, however unreasonable or arbitrary they might seem by today's rapidly evolving standards, the enforcement of such regulations in an era prior to both the 1972 amendments to Title VII and this Court's LaFleur decision should not be held sufficient to allow awards of damages against hard-pressed municipal treasuries.

With respect to the issues here presented of whether an entity such as the New York City Board of Education is a "person" within the meaning of § 1983 and whether entities immune from suit under that section can be cast in damages by the device of seeking "equitable" relief against officials sued only in their official capacities, we would only note that, while the law in the different circuits on these issues does seem to be in a state of serious disarray, we believe Judge Gurfein's analysis of these issues for the court below in this case is entirely sound. Any other result than that reached here on these issues would render virtually meaningless this Court's decisions in Monroe v. Pape, 365 U.S. 167 (1961); Moor v. County of Alameda, 411 U.S. 693 (1973); and City of Kenosha v.

Bruno, 412 U.S. 507 (1973).

While we are aware that such disagreement between the various Courts of Appeals argues for the grant of certiorari in this case, we would urge that, unless this Court is of the view that the result here reached by the Court of Appeals for the Second Circuit was incorrect, this Court should not grant certiorari in this case; but, rather, if it is of the view that certiorari should be granted to consider these issues, the writ should be granted in a case where it has been sought by an aggrieved governmental agency or the officers thereof. In addition, as an additional reason for here denying issuance of a writ of certiorari, we would also note that, despite the fact that there is at present a dispute between the circuits on these issues, within the next few years, as Title VII comes increasingly to occupy

this field, these issues should rapidly decrease in importance, thus perhaps rendering unwarranted here the exercise of this Court's certiorari jurisdiction.

CONCLUSION

The writ of certiorari should be denied.

November 28, 1976

Respectfully submitted,

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L. KEVIN SHERIDAN,
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MEILEN PRESS INC — N. Y. C. 219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1914

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

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Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, *et al.*,

Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75 - 1914

JANE MONELL, et al.,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court certifying this is a class action is reported at 356 F. Supp. 1051 (S.D.N.Y. 1972). Petition, pp. A1-A14. The opinion of the district court dismissing this

action is reported at 394 F. Supp. 853 (S.D.N.Y. 1975). Petition, pp. A15-A27. The opinion of the United States Court of Appeals for the Second Circuit, is reported at 532 F. 2d 259 (1976). Petition, pp. A28-A70.

JURISDICTION

The Second Circuit rendered its judgment affirming the dismissal of this action on March 8, 1976 and entered its order on the same date. An extension of time within which to file this petition to July 9, 1976 was granted by Mr. Justice Marshall on May 25, 1976. Certiorari was granted on January 25, 1977. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Section 1983, 42 U.S.C., provides:

> Every person who, under color of any statute, ordinance, regulation,

> custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTION PRESENTED

Are local governmental officials and/or local independent school boards "persons" within the meaning of 42 U.S.C. §1983 when equitable relief in the nature of back pay is sought against them in their official capacities?

STATEMENT OF THE CASE

The plaintiffs in this action are female employees of the New York City Department of Social Services and of the New York City Board of Education suing on behalf of themselves and other similarly situated female employees of the Board

and City. The defendants are the Board of Education of the City of New York and the Chancellor thereof, the Department of Social Services and Commissioner thereof, and the Mayor. The gravamen of the complaint is that the defendants compelled pregnant female employees to take unpaid leaves of absence before medical reasons required them to do so.

This action was commenced on July 26, 1971, alleging that the disputed policies violated the Fourteenth Amendment. Jurisdiction was alleged to exist, inter alia, under 42 U.S.C. § 1983 and 28 U.S.C. §1343(3).*/ Plaintiffs sought both

*/ The complaint was amended on September 14, 1972 to add a cause of action under the then newly amended provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e. The District Court held the 1972 amendments to Title VII, applying that provision to state and local governments, did not provide a remedy for acts of discrimination occurring prior to the date of that amendment. Petition, A25-A26. The Court of Appeals affirmed

injunctive and monetary relief. On January 29, 1972, New York City put into effect a change in policy permitting a pregnant employee to remain on the job so long as she was in fact able to continue to perform her job. This new policy governed the Department of Social Services but not the independent Board of Education. On April 12, 1972, the District Court denied both defendants' motion to dismiss and plaintiffs' motion for summary judgment, but granted plaintiffs' motion to certify this as a class action. In November of 1973 the Board of Education adopted new by-laws, retroactive to September 1, 1973, permitting pregnant

*/ continued

this holding. Petition, A37-A43. Certiorari was sought with regard to this aspect of the decision below, Petition, pp. 14-23, but certiorari was limited to the question regarding §1983. 45 U.S.L.W. 3058.

female employees to remain on the job so long as they were actually able to perform their duties. On January 21, 1974, this Court decided Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), holding invalid under the Fourteenth Amendment pregnancy regulations similar to those of the instant defendants.

On April 30, 1974, the district court concluded that plaintiffs' injunctive claims were moot, and dismissed plaintiffs' claim for back pay for lack of subject matter jurisdiction. On March 8, 1976, the Court of Appeals affirmed.

SUMMARY OF ARGUMENT

The Court of Appeals held in this case that no monetary relief was available under 42 U.S.C. Section 1983 against the Board of Education of the City of New York, or its Chancellor, or officials

of the City of New York who had effected the unconstitutional acts at issue. The court reasoned that to allow such monetary relief would frustrate the ruling of Monroe v. Pape, 365 U.S. 167 (1961) that a city was not a "person" within the meaning of section 1983. Petitioners urge that this reasoning is unsupportable and that the ruling of the court below extends the relevant holding of Monroe in a manner contravening the language, purpose, and legislative history of section 1983. Petitioners' view is supported by the weight of this Court's decisions relating to school boards and to errant municipal officials.

As to school boards, it should be noted that in the long line of cases dealing with school desegregation -- some of which had a far greater financial

impact than is contemplated here -- jurisdiction rested on section 1983. This Court clearly would not have effected the far reaching changes involved in those cases had subject matter jurisdiction been lacking, i.e., had school boards not been "persons" for the purposes of section 1983. Congress, moreover, has subsequently manifested its approval of this line of cases and its interpretation of section 1983. Even if the Reconstruction Congress had intended to exclude school boards from the ambit of section 1983, which it did not, the subsequent reliance by Congress on a contrary determination by this Court ought not be disturbed now.

As to the defendant officials, petitioners would have the Court note that they do not assert that New York City is liable for all violations of its employees, but only

that officials who have used their powers to violate the Constitution can be compelled to use those same powers to remedy the violation. This Court has approved such decrees in several cases decided after Monroe, and the court of appeals wrongly rejected those authorities. The lower court sought to harmonize its result with the well established doctrine allowing suits in equity against named officials by creating an arbitrary and, in this context, wholly new distinction between types of equitable relief, viz., allowing only that which does not call for monetary restitution. The court of appeals supported this new approach by analogizing section 1983 to the Eleventh Amendment as construed in Edelman v. Jordan, 415 U.S. 651 (1974), A55-A60.

This superficially appealing analogy does not withstand analysis in depth -- for it ignores the very different legislative purposes underlying the two laws. The central purpose of the Eleventh Amendment was to insure that the federal courts would not impose liability on the states in suits by citizens. In contrast, the primary purpose for which section 1983 was enacted was to ensure appropriate remedies for wrongful acts under color of law, manifestly including wrongful acts by local officials, Monroe v. Pape, supra, 365 U.S. at 171, 173.

The legislative history of section 1983, held in Monroe v. Pape, supra at 187-192, to indicate an exclusion by Congress of municipalities from the word "persons" does not justify an extension of Monroe's exclusion to the situation

presented here. The Sherman amendment would have made cities liable even for civil rights violations committed within their borders by persons who were not city officials. It was rejected for various reasons but prime among them was the recognition that many cities did not enjoy, under state law, the police powers necessary to control those violations. Thus the rejection cannot support an interpretation of section 1983 which would frustrate its central purpose and violate its plain language.

Finally, since, from the time of filing of the complaint, the district court had the power to grant a preliminary injunction providing full prospective relief, Congress could not have intended to foreclose the less drastic remedy of appropriate monetary relief.

ARGUMENT

Introduction

The question presented by this case raises three distinct though closely related legal theories.

We contend, first, that a school board is a "person" within the meaning of section 1983. If the Court concludes that it is, relief would be possible on remand to three of the named plaintiffs and that portion of the plaintiff class, perhaps half, that work for the Board of Education.

We urge, second, that an official who withholds wages in violation of the constitution can be compelled in a section 1983 action to provide back pay out of the public funds under his control and from which those wages were originally due. Should the Court hold

that such relief is possible, back pay will be available on remand to all the named plaintiffs and class members.

Finally we maintain that a district court can award monetary relief in a section 1983 action for injury sustained between the filing of the complaint and the granting of final injunctive relief. Such a remedial authority, if upheld, would cover all the named plaintiffs but only a small fraction of the plaintiff class.

We brief each of these legal theories in turn. The second, if resolved in our favor would obviate the need for resolution of the other two.

I. A School Board Is A "Person" Within The Meaning of Section 1983

The only question presented and decided in Monroe v. Pape was that "Con-

gress did not undertake to bring municipal corporations with the ambit" of section 1983. 395 U.S. at 188. This conclusion was based on the rejection by Congress of the Sherman amendment rendering cities and counties liable for certain acts of violence by private individuals committed within their jurisdiction. Because counties were also included within the defeated amendment, Moor v. County of Alameda, 411 U.S.693, 708-710 (1973), held that counties were also not subject to suit under section 1983. The court below extended Monroe to hold that the defendant Board of Education was not a "person", and suggested that virtually any public body should enjoy a similar imunity.

From Brown v. Board of Education, 347 U.S. 483 (1954) to East Carroll Parish School Board v. Marshall,424 U.S.

636 (1976),*/ this Court has entertained and decided on the merits nineteen actions commenced under section 1983 in which the primary defendant was a school board. In numerous other instances,the Court has dealt summarily with such cases. Of the Court's written opinions eight involved actions in which section 1983, together with 28 U.S.C. §1343, was the sole basis of jurisdiction alleged,**/ while in eleven cases an-

*/On April 19, 1977, Vorchheimer v. School District of Philadelphia, a section 1983 action, was affirmed by an equally divided court. 45 U.S.L.W. 4378.

**/East Carroll Parish School Board v. Marshall, supra (The intervenors complaint also alleged a violation of the Voting Rights Act; the Court rejected this claim on the merits but upheld the constitutional claim under section 1983); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Keyes v. School District No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Northcross v. City of Memphis Board of Education, 397 U.S. 232 (1970); Tinker v. Des Moines Independent School, 393 U.S. 621 (1969); District of Abington Township v. Schempp, 374 U.S. 203 (1963); McNeese v. Board of Education, 373 U.S. 668 (1963).

other federal cause of action was also alleged.*/ All but one of these decisions occurred after the decision in Monroe and five of them were handed down after City of Kenosha v. Bruno, 412 U.S. 507 (1973). All of them involved constitutional issues which, under the practice

*/ Milliken v. Bradley, 418 U.S. 717 (1974) (42 U.S.C. §2000d; jurisdiction was also alleged under 28 U.S.C. §1331, which provides jurisdiction to enforce the Fourteenth Amendment); Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) (42 U.S.C. §1981; jurisdiction was also alleged under 28 U.S.C. §1331); San Antonio School District v. Rodriguez, 411 U.S. 1 (1974) (42 U.S.C. §1981; jurisdiction was also alleged under 28 U.S.C. §1331); Kramer v. Union Free School District, 395 U.S. 621 (1969) (42 U.S.C. §1983); Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) (42 U.S.C. §1981) (nine cases); Carter v. West Feliciana Parish School Board, 396 U.S. 226, 290 (1969) (42 U.S.C. §1981) (thirteen cases); Green v. County School Board of New Kent County, 391 U.S. 430 (1968) (42 U.S.C. §1981); Monroe v. Board of Commissioners, 391 U.S. 450 (1968) (42 U.S.C. §1981); Raney v. Board of Education, 391 U.S. 443 (1968) (42 U.S.C. §1981); Goss v. Board of Education, 373 U.S. 668 (1963) (42 U.S.C. §1981; jurisdiction was also alleged under 28 U.S.C. §1331); Bush v. Orleans Parish School Board, 365 U.S. 569 (1961) (42 U.S.C. §1981, 28 U.S.C. §1331 and §1343).

of this Court, not only can but should be avoided if the action can be disposed of on another basis.

The court of appeals dismissed such decisions of this Court on the ground that there were also individual defendants in each case, and intimated that these individuals were the defendants with which the Court was really concerned and that its failure to dismiss as to the defendant school boards was, at best, not a "reasoned determination." Petition A51-A53. In fact, however, this Court's opinions involved repeatedly emphasized that it was the school board which had violated the constitution and was subject to an appropriate remedial order. In Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969), the Court entered a stay directing the

boards and the boards alone to take specified action.*/ In Bradley v. Richmond School Board, 416 U.S. 696 (1974), the Court described that case, which had twice before been resolved here on its merits,**/ as "a class action under the Civil Rights Act of 1871, 42 U.S.C. §1983" "against the School Board of the City of Richmond, Virginia." 416 U.S. at 699. In Davis v. Board of School Commissioners, 402 U.S. 33, 35 (1971), the Court affirmed an order of the Fifth

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*/ "Petitioners' application for a temporary injunctive order requiring the respondent school boards to take such preliminary steps as may be necessary to prepare for complete student desegregation by February 1, 1970, is granted .... (3) By way of interim relief pending further order of this Court, the respondent school boards are directed to take no steps which are inconsistent with, or which will tend to prejudice or delay, a schedule to implement on or before February 1, 1970, desegregation plans submitted by the Department of Health, Education, and Welfare for student assignment simultaneous with the other steps ordered by the Court of Appeals." 396 U.S. at 228.

**/ 382 U.S. 103 (1965); 412 U.S. 92 (1973).

Circuit "directing the District Court to require the board to establish a faculty and staff ratio in each school substantially the same as that for the entire district." In Keyes v. School District No. 1, 413 U.S. 189 (1973) the Court detailed at length the burden of proof and constitutional obligations to be met by the "respondent School Board" on remand. 413 U.S. at 213-14. In Green v. School Board of New Kent County, 391 U.S. 300 (1968) the Court directed that "The Board must be required to formulate a new plan and . . . . fashion steps which promise realistically to convert to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. See also Monroe v. Board of Commissioners, 391 U.S. 450, 459 (1968).

In light of this series of deci-

sions nearly every court of appeals has entertained actions under section 1983 against school boards for a wide variety of constitutional violations.*/ Four of those circuits ordered or upheld awards of back pay against school boards after, and notwithstanding, Monroe.**/ Since

*/ Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976); Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2nd Cir. 1974), cert. den. 400 U.S. 976; Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3rd Cir. 1976), aff'd 45 U.S.L.W. 4378; Horton v. Orange County Board of Education, 464 F.2d 536 (4th Cir. 1972); Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975), cert. dismissed 425 U.S. 599; Oliver v. Kalamazoo Board of Education, 508 F.2d 178 (6th Cir. 1974), cert. den. 421 U.S. 963; Educational Association East v. Board of Education of Aurora, 490 F.2d 431 (7th Cir. 1973); Brenden v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973); Canton v. Spokane School District No. 81, 498 F.2d 840 (9th Cir. 1974).

**/ Horton v. Orange County Board of Education, 464 F.2d 536 (4th Cir. 1972); Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (4th Cir. 1966) (en banc); Rolfe v. County School Board of Education of Lincoln County, 391 F.2d 77 (6th Cir. 1968); Gierenger v. Central School District No. 58, 477 F.2d 1164 (8th Cir. 1973); Smith v. Board of Education of Morrilton School District, 36 F.2d 770 (8th Cir. 1966); Burton v. Cascade Union District High School, 512 F.2d 850 (9th Cir. 1975); Moore v. Board of Education of Chideston School District, 448 F.2d 709 (9th Cir. 1971).

City of Kenosha, however, considerable confusion has arisen among the lower courts on this issue. Petition 26-27.

This long history of decisions in this and other courts upholding section 1983 actions against school boards is important, not only because of its precedental significance but also because Congress has for more than 23 years since Brown refused to overrule these cases. On repeated occasions members of Congress have proposed, and the Congress has refused to adopt, legislation expressly limiting the ability of the federal courts to issue remedial orders to a "school board" in a desegregation case.*/ Instead of disapproving section 1983 actions against school boards, Congress has adopted several measures premised on the assumption that such litigation

*/ See, e.g. H.R. 13534, 92d Cong., 2d Sess. (§2922); H.R. 159, 92d Cong., 1st Sess. (§1207).

was and would continue to be proper. Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. §1617, provides in part:

> Upon the entry of a final order by a court of the United States against a local Educational agency . . . for discrimination on the basis of race, color or national origin in violation of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (emphasis supplied)

Awards were authorized against such school boards because Congress recognized, in the words of the Senate sponsor, that "in most instances the suit is brought against the local school board."*/ Similarly, when Congress modified section

*/ 117 Cong. Rec. 11522 (remarks of Sen. Cook).

1988 to authorize counsel counsel fees in litigation to enforce, inter alia, section 1983,*/ the House Report cited Brown v. Board of Education, 347 U.S. 483 (1954), as the sort of case in which fees could be awarded,**/ and the Senate Report noted that under section 1983 and the other statutes the defendants "are often state or local bodies."***/

Because these past decisions involve the construction of a statute, rather than of the constitution, and because Congress, while clearly cognizant of them, has chosen not to overturn them, it would be inappropriate to overrule them even if this Court now thought them erroneous. Edelman v. Jordan, 415 U.S. 651, 671, n. 14 (1974). Adherence

*/ Public Law 94-559.

**/ H.R. Rep. No. 94-1558, pp. 4-5.

***/ S. Rep. No. 94-1011, p. 5.

to this construction of section 1983 is particularly appropriate because, regardless of whether it may "accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today." Runyon v. McCrary, 96 S. Ct. 2586, 2604 (1976) (Stevens, J., concurring). Within the last decade Congress has adopted legislation reiterating the existence of a federal cause of action against a school board eo nomine for discrimination in the treatment of either students*/ or staff.**/

That school boards have been treated as "persons" subject to suit under section 1983 is entirely consistent with the legislative history of that provision.

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*/ 20 U.S.C. §§1703(a)(b)(c) and (e), 1706, 1708.

**/ 20 U.S.C. §1703(d); 42 U.S.C. §2000e (as amended in 1972). Both types of discrimination are also made actionable by 42 U.S.C. §2000d.

The rejected proposal of Senator Sherman dealt solely with imposing liability on cities and counties for unlawful conduct by private individuals, and was not concerned with public entities generally. See Monroe v. Pape, 365 U.S. at 188, n. 38. In the southern states with which the Reconstruction Congress was particularly concerned, education in the years after the Civil War was a private matter. As this Court noted in Brown v. Board of Education, 347 U.S. 483, 489-90 (1954),

> In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost non-existent . . . It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on northern states was generally ignored in the Congressional debates. Even in the North the conditions of public education did not approximate those existing today.

Thus while Congress was not, and could not have been, concerned to place schools outside the definition of "person," discrimination therein, although actionable under section 1981, would not have been reached by section 1983 since such action was not under color of law.

While school boards are now public entities whose actions are subject to the Fourteenth Amendment, that fact alone does not warrant treating them in the same manner under section 1983 as Monroe holds was intended for cities and counties. This Court long ago rejected the suggestion that the protection of the Eleventh Amendment be extended to all governmental units merely because established, related to or funded in part or whole by the state. Edelman v. Jordan, supra, 415 U.S. at 667, n. 12 (1974); Lincoln County v. Lunning, 133 U.S. 529 (1890). The special status of a city or county under Monroe only extends to another governmental entity which is merely an agent or "alter ego" of the city or county. See George R. Whitten, Jr., Inc. v. State University, 493 F. 2d 177, 179-180 (1st Cir. 1974). School boards in the United States, however, have traditionally been uniquely autonomous entities. Milliken v. Bradley, 418 U.S. 717, 741 (1974).

The status of the New York City Board of Education is typical. The Board is created by virtue of state law, not local ordinance, and has its own corporate existence.*/ Of its 7 members, the mayor

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*/ N.Y. Education Law, §2551. Petitioners acknowledge that in their complaint they erroneously characterized the Board of Education as a department of the city government. Amended complaint, ¶21, A 11. That error, however, does not alter the Board's actual status as an independent corporate body established by the state.

appoints two, and each of the five borough (county) presidents appoints one.*/ The members serve for fixed terms and are not subject to the control or supervision of the mayor, borough presidents, or city council; their powers and duties are established by the state legislature.**/ Thus in the instant case, when the mayor decided to alter the city policy regarding pregnant employees, the Board was under no obligation to alter its practices and in fact continued to remove such employees for another year and a half. The city, Board and governor regularly disagree on public policies and funding decisions, lobby against one another in the legislature, and sometimes even bring

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*/ N.Y. Education Law, §2590-b(1)(a).

**/ N.Y. Education Law, §2554.

suits against each other.*/ The Board is not entirely funded by any one source, but receives substantial sums for the city, the state, and the federal government. The city is required by state law to appropriate for the board, to use as it pleases,**/ a share of the estimated yearly budget; it cannot appropriate less and need not appropriate more.***/ That share is not insubstantial, exceeding $1 billion.****/ Although the city comptroller also serves as the treasurer for the Board, and holds all Board funds, those funds must be disbursed "by

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*/ "Board of Education to Sue City for Funds Under Stavisky Law," New York Times, 4/30/77, pp. 112-13.

**/ Divisich v. Marshall, 281 N.Y. 170, 173-74 (1939).

***/ N.Y. Education Law §2576(5).

****/ See footnote */ above.

authority of the board of education upon written orders . . . signed by the superintendent of schools and the secretary of the board of education or such other officers as the board may authorize."*/ The city serves solely "as custodian and depository of school funds, and its only duty with respect to that fund is to keep it safely and disperse the same according to the instruction of the Board of Education." People ex rel. Wells & Newton Co. v. Craig, 232 N.Y. 125, 137 (1922). The Board brings and defends litigation at its own initiative and in its own name, and has repeatedly been characterized by the highest state court as "an independent corporation separate and distinct from the city."**/ The New York Court of

*/ N.Y. Education Law, §2580.

**/ Lanza v. Wagner, 11 N.Y. 2d 317, 326 (1962); People ex rel. Wells & Newton Co. v. Craig, 232 at 135.

Appeals has expressly relected the assumption of the Second Circuit that the city is the real party in interest in an action against the Board.*/

In sum the New York City Board of Education, like most other boards, has a significant relationship with the city, the five counties therein, the state, and the federal government, but is in no sense an alter ego of any one of them. Under these circumstances it would be entirely inappropriate to confer upon the Board the protection from suit under section 1983 which Monroe concluded Congress intended for cities and counties. Since the Board is thus a person within the meaning of section 1983, those named plaintiffs and members of the plaintiff class employed by the Board can sue the Board as such for any appropriate relief.

*/ People ex rel. Wells & Newton Co. v. Craig, 232 N.Y. at 136.

II. The District Court Had The Authority To Direct The Individual Defendants To Provide Back Pay From Public Funds Under Their Control

A. The Decision Below Departed From Precedent By Establishing An Un-Authorized Exclusion From The Scope of 42 U.S.C. §1983.

Petitioners maintain that, where a public official exercises the powers of his office to inflict a constitutional injury, the federal courts, having jurisdiction over that official by virtue of section 1983, can require him to exercise the powers of his office to remedy that injury. Where, as here, that injury included an order by the individual defendants that the plaintiffs not be paid their normal salary merely because they were pregnant, the defendants can, and under ordinary circumstances must, be directed to countermand their original decision and direct payment of compensation for that period.

The court of appeals appears to have misunderstood our argument, and the decisions of other appellate courts awarding back pay in section 1983 actions, */ to suggest that money judgments could be obtained against a city, to the same extent that would have been the case were cities "persons" under section 1983, merely by seeking such an award against any city official in his "official capacity." Petition, A60. The construction of section 1983 advanced by us, and adopted by a number of lower courts, seeks no such rejection of Monroe, and is applicable only under certain narrow circumstances. We contend

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*/ The courts of appeals have been divided on the issue. Compare Muzquiz v. City of San Antonio, 528 F.2d 499 (5th Cir. 1976) (en banc) (no monetary award against officials) with Burt v. Board of Trustees, 521 F.2d 1201, 1205 (4th Cir. 1975) (school board members held subject to back pay awards in their official capacities) and Incarcerated Men of Allen County v. Fair, 507 F.2d 281, 287-288 (6th Cir. 1974) (award of counsel fees against a sheriff sued in his official capacity held proper).

only that the city official who committed the constitutional violation, and who is thus a proper party defendant in a section 1983 action, must use all his official powers to remedy that violation. Such a rule will only entail monetary relief where the defendant who engaged in the violation was the chief executive or policy making body of the city or county, or some other high ranking official authorized to direct the expenditure of funds. The primary application of this construction will be in instances where, as here, the highest officials of a city or county adopt or effect an official policy directing, in violation of the constitution, that money be taken or withheld from the aggrieved plaintiffs. In such a case section 1983 provides the federal courts with power to order the errant official to invoke his official

power to restore funds unlawfully withheld.

This issue, we contend, goes to the remedial authority of a court under section 1983, not to its jurisdiction. It is not denied that the district court in this action had jurisdiction over both the persons of the mayor and other individual defendants, and over the subject matter of the action, an alleged violation of the Fourteenth Amendment. Absent some special constraint the federal court would have plenary authority to order the individuals to take any action within their legal and physical ability to remedy the constitutional violation which occurred. The question presented is whether section 1983 was intended to limit the ordinary remedial power of the federal courts over such defendants.

Since Marbury v. Madisen, 1 Cranch (U.S.) 137, 162, 163 (1803), "it has been the rule . . . that the court will be alert to adjust their remedies so as to grant necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946). In Griffin v. School Board of Prince Edward County, 377 U.S. 218, 233 (1964), this Court rejected an attempt to limit the ability of the federal courts in section 1983 actions to redress violations of federal law.

> The District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial

> discrimination a public school system in Prince Edward County like that operated in other counties in Virginia. (Emphasis added).

Where, as here, it is within the authority of the defendants to provide the plaintiffs with the back pay required to fully remedy the unlawful conduct, the district court can compel them "to exercise the power that is theirs." In the instant case, where the violation alleged is constitutional in nature, a statutory limitation on the remedial authority of the federal courts would itself pose serious constitutional questions, and such a limitation should not be inferred, and the resolution of such questions required, unless Congress has indicated an unequivocal intent to interfere with the normal remedial powers of the courts.

In holding that officials of local governments and school boards were not subject to an award directing them to

restore back pay to the petitioners, the Second Circuit created an exception to the coverage of section 1983 which finds no support in the decisions of this Court. Monroe v. Pape, 365 U.S. 167 (1961), does not support respondent's position. In Monroe the Court held that the word "person" did not include the City of Chicago. 365 U.S. at 191. It reached this conclusion in a kind of afterward to its central holding that a police officer acting in violation of the Fourteenth Amendment while clothed with municipal authority was liable under the statute: "The City of Chicago asserts that it is not liable under [§1983]. We do not stop to explore the whole range of questions tendered us on this issue at oral arguments and in the briefs." Id. at 365 U.S. 187.

Nor does City of Kenosha v. Bruno, 412 U.S. 507 (1973) support the decision

below. In that case the majority opinion carefully noted that:

> The only defendants named in the complaints, however, were municipalities of Kenosha and Racine.
> Id. at 412 U.S. 512

In his concurrence, Mr. Justice Brennan also stated the issue narrowly:

> Nevertheless, since the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U.S.C. §1343 . . .
> 412 U.S. at 516

On a deeper level, City of Kenosha demonstrates the inapplicability of the exclusion doctrine created by the Second Circuit, for the basic holding of Kenosha was that a section 1983 action would not lie against a municipality regardless of the type of the relief sought. Yet the Second Circuit held that these defendants could be sued for equitable or declaratory relief but not

monetary relief, Petition, A53-A68.*/ Thus the court was simultaneously holding that it was--and was not--bound by the doctrine of Monroe v. Pape and City of Kenosha v. Bruno. The Second Circuit reached this impasse in its effort to resolve obviously competing claims. On one hand there is the language and purpose of section 1983 which calls for effective protection of federal rights. On the other there is the Monroe-Bruno doctrine excluding actions against municipalities. Petitioners contend that these tensions are

*/Even assuming the validity of the court of appeals' approach, other forms of equitable relief were available which, though not affording complete redress, should have been adopted, e.g., the award of compensatory time off with pay in lieu of back pay for those members of the class who were still employed by the defendants. The court of appeals also ignored the claims to non-monetary relief of those class members who had lost seniority rights or salary steps as a result of their involuntary maternity leave. See Brief of Appellants in the Court of Appeals at 5.

more logically resolved by permitting relief requiring the defendant officials to use their power to remedy their own wrongs, rather than characterizing this suit as one essentially against the entities employing them and trying, however awkwardly, to fit it under cases applicable to municipalities.*/

Although this Court has not squarely decided this issue it has on three

*/ The unsettling consequences of this approach are illustrated by Muzquiz v. City of San Antonio, 528 F. 2d 499 (5th Cir. 1976) (en banc), rev'g 520 F. 2d 993 (5th Cir. 1975), a case in which the plaintiffs sought monetary restitution for money they had paid into a municipal pension fund. The divided en banc court held that the pension fund board of trustees was not a §1983 "person"; that the members of the board, in their official capacities, were not "persons" insofar as plaintiffs sought restitution from the fund; and that, indeed, the official-capacity board members were not even "persons" insofar as declaratory and injunctive relief were requested, because such relief would constitute "in substance a determination of plaintiffs' entitlement to restitution from the fund itself." 528 F. 2d at 501.

occasions indicated that monetary restitution under the narrow circumstances here present are proper. In Vlandis v. Kline, 412 U.S. 441 (1973), a section 1983 action, decided the same day as City of Kenosha v. Bruno, 412 U.S. 507 (1973), the Court held unconstitutional Connecticut's irrebutable presumption that the plaintiffs were not residents of Connecticut and thus subject to the higher tuition and fees charged to non-residents attending the University of Connecticut. The district court, which has reached a similar conclusion regarding the merits, had directed the University's Director of Admissions to refund to the plaintiffs "the amount of tuition and fees paid in excess of the amount paid by resident students," 412 U.S. at 445; this Court affirmed that order, 412 U.S. at 454.

In Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), this Court held unconstitutional the defendants policy of compelling pregnant female employees to cease working for a total of at least eight months. The district court, which had also held that policy unlawful, directed that the defendant board and superintendent of schools in that section 1983 action restore the plaintiff to "the same position she would have been in had she been allowed to teach," such relief to include "recovery of her salary for the months [when she was suspended], seniority to which she is entitled, and any and all other rights and benefits she would have received had she been teaching during that period." Cohen v. Chesterfield County School Board, 326 F. Supp. 1159, 1161 (E.D. Va. 1971). This Court,

in upholding the action of the district court, characterized its remedial order as "appropriate relief," 414 U.S. at 638.

In Edelman v. Jordan, 415 U.S. 651 (1974), the plaintiffs sued, under section 1983, the director of the Illinois Department of Public Aid, and other individuals, urging that they had administered the federal-state programs of Aid to the Aged, Blind, Disabled in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. The defendants did not contest in this Court the findings below that they had acted unlawfully, but urged that the Eleventh Amendment constituted a bar to an order directing them to restore to plaintiffs benefits which would have been paid had they acted in compliance with the federal regulations. Five members of the

Court thought it necessary to reach the constitutional issue, seeing no bar to such awards in section 1983 itself, and found that the Eleventh Amendment prohibited such awards where the funds were to be paid out of the state treasury. 415 U.S. at 657-678. Four members of the Court, also finding no inhibition in section 1983, concluded that the Eleventh Amendment did not bar such an award, and would have affirmed the order of the Seventh Circuit directing the individual defendants to restore retroactively the assistance benefits unlawfully withheld. Justice Marshall, in a dissenting opinion joined by Justice Blackmun, noted that "Congress intended the full panoply of traditional judicial remedies to be available to the federal courts in these §1983 suits." 415 U.S. at 691. Although

the Court was sharply divided as to the meaning of the Eleventh Amendment, no member of the Court thought that there was any statutory inhibition against the award there sought.

Even if the Court does not feel bound by the decisions regarding §1983 in Vlandis, La Fleur, and Edelman because the results were reached there without discussion, it is nonetheless true that, as the Court observed in another §1983 case, ". . . it is in the shadow of those cases that the question must be decided," Mitchum v. Foster, 407 U.S. 225, 231 (1972).

B. Section §1983 Should Be Read In Accordance With Its Plain Language.

Section 1983 contains no express limitation on the remedial authority of a federal court over defendants, such as

natural persons, who are subject to suit. On the contrary, that section provides in broad terms that a defendant who has violated any of the substantive provisions referred to "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The defendant officials are indisputably covered by the plain language of §1983: All of them are clearly "persons." That statutory language is normally determinative is axiomatic under our system of legislative democracy. */ Were this not so, the power entrusted by

*/ As Mr. Justice Frankfurter once put it:

> A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. -Frankfurter, "Some Reflections on the Reading of Statutes," 47 Columbia L. Rev. 527 (1947).

the people to Congress could be subtly assumed by the judicary or the executive.**/ Naturally, therefore, this rule of construction has been used repeatedly by this Court in resolving doubts about the scope of §1983.

In holding that §1983 was an exception to the federal anti-injunction act this Court noted that Congress "...plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a 'suit in equity' as one means of redress," Mitchum v. Foster, 407 U.S. 225, 242 (1972). So too was the language determinative when the question was whether §1983 protected property rights as well as personal rights, Lynch v. Household Finance Corp., 405 U.S. 538, 549 (1972). And in Rizzo v. Goode, 96

**/ See generally The Federalist Papers, Nos. 47 and 48.

S. Ct. 598, 604 (1976), the Court relied upon "the plain words" of the statute in determining the scope of its applicability.

In the rare instance in which this Court has interpreted §1983 at variance with its own words, Imbler v. Pachtman, 96 S. Ct. 984 (1976), the conclusion --that §1983 did not abolish a prosecutor's common law immunity from civil liability-- was compelled by the vital public interest at stake and by the clear weight of legal history,*/ factors which here weigh in petitioners' favor.

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*/ Compare the concurring opinion of Mr. Justice White in Imbler v. Pachtman, supra, at 96 S. Ct. 996:

> "As the language itself makes clear, the central purpose of 42 U.S.C. §1983 [is to provide a remedy against] 'an official's abuse of his position.'" (Emphasis in original)

C. Fulfillment Of The Central Purpose Of §1983 Requires That Officials Be Considered Persons When Sued In Their Official Capacity.

The central purpose of §1983 has not been a matter of disagreement: it was to provide a federal remedy for persons deprived of federal rights by persons exercising the authority of local government. Mr. Justice Frankfurter, in his dissent in Monroe v. Pape, summed up his view of the meaning and purpose of the statute:

> Section 1 [of the Ku Klux Act of 1871] aimed at another evil, the evil not of combinations dedicated to purposeful and systematic discrimination, but of violation of any rights ... secured by the constitution through the authority, enhanced by the majesty and dignity, of the States. Here it was precisely this authorization, this assurance that behind a constitutional violation lay the whole power of the State, that was the danger. 365 U.S. at 257.

This view of §1983 and its predecessors was of course accepted by the majority

in Monroe, which built on that foundation to include coverage of wrongs committed by officials in violation of local law.*/ In construing the reach of §1983 this court has again and again used this central purpose as a touchstone.

In Mitchum v. Foster, 407 U.S. 225 (1972), for example, the question was whether §1983 was an exception to the federal anti-injunction statute. Holding that it was, the Court stated that §1983 was enacted for the "express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment,'"**/ and that the statute was, like the Amendment, directed "'against State action, ... whether that

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*/ Monroe v. Pape, supra at 365 U.S. 173. See also concurring opinion of Mr. Justice Harlan, Id. at 194, 195, 201.

**/ 407 U.S. at 238.

action be executive, legislative or judicial.'"*/ Were it not interpreted to include authority to enjoin pending State proceedings, reasoned the Court, it could not serve one of the ends for which it was enacted.

Here, by contrast, the court of appeals lost sight of the vital center of the statute and interpreted it so as to frustrate its primary goal. The core allegations of the complaint in this action state that the plaintiffs were deprived of their employment as a direct consequence of policies adopted by, and/or effected by the Mayor of the City of New York, the Commissioner of Social Services, and the Chancellor of the Board of

*/ 407 U.S. at 240 (emphasis in original deleted). See also Lynch v. Household Finance Corp., 405 U.S. 538(1972); McNeese v. Board of Education, 373 U.S. 668 (1962).

Education.*/ If, as must be accepted at this stage of the litigation, plaintiffs' allegations that they were suspended pursuant to those policies because they became pregnant are true, then they have been penalized for exercising what this Court has included "among the basic civil rights of man," Cleveland Board of Education v. LaFleur, 414 U.S. 632, 640 (1974). Yet if the decision below is allowed to stand, the plaintiffs will be left without recourse. They can obtain relief against the defendants neither in their official capacities nor in their individual capacities, for plaintiffs have not alleged that defendants acted maliciously or in bad faith.**/ Plaintiffs

*/ Compare the situation in Monroe v. Pape, supra, in which liability was sought to be imposed on the City of Chicago in consequence of acts committed by police officers in total disregard of local law.

**/ Individual liability would be appropriate only if one of these two tests could be met, Wood v. Strickland, 420 U.S. 308, 322 (1975).

are thus caught between doctrines which threaten to strip section 1983 of much of its force as a remedial statute, even in situations in which the violation is effected through the "majesty and dignity" of local law.

The denial of relief to plaintiffs is unfortunate for them, but, more important here, it has grave consequences for the status of a broad range of constitutional rights traditionally protected by §1983. These include freedom of speech,[*] equal protection of law[**] and due process of law.[***] If reversal is not forthcoming,

[*] Elrod v. Burns, 96 S. Ct. 2673 (1976)(relief pursuant to §1983 granted to victim of politically motivated dismissal).

[**] Sugarman v. Dougall, 413 U.S. 634 (1974)(municipal official ordered, pursuant to §1983, not to discriminate against aliens in employment).

[***] Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)(school officials ordered not to arbitrarily suspend pregnant teachers).

it is predictable that future violations will go unremedied. The victims of the wrongs will, in effect, have had no constitutional protection:

> It was early recognized in England that high-sounding pronouncements of personal liberties are hollow when no enforcement role is given to an effective and independent court system.[*]

We can, moreover, predict an increase in constitutional violations, for by immunizing public officials from the threat that budgets under their control will be made available to make whole the victims of unconstitutional policy decisions an important incentive to forbear such policy making will be eliminated.[**]

[*] Mr. Justice Brennan, "Landmarks of Legal Liberty," The Fourteenth Amendment 2, Schwartz, Ed. (1970).

[**] See Albermarle Paper Co. v. Moody, 95 S. Ct. 2362 (1975)(deterrent effect of back pay emphasized).

Although recognizing the unfairness of its denial of monetary relief to the plaintiffs, Petition 68A-70A, the court of appeals felt constrained to so hold because of an analogy it found between section 1983 and the Eleventh Amendment, an analogy which plaintiffs contend is without foundation.

D. The Eleventh Amendment "Analogy" Relied Upon By The Court Below is Unsound.

The court below, although recognizing that the Eleventh Amendment was not itself applicable, found an Eleventh Amendment "analogy" which prohibited monetary awards under Sec. 1983 against "persons" which would be payable from the treasury of municipalities which are not "persons.." Petition A68-A70.

This analogy is far less compelling than the court below thought it, and not alone because it overlooks that the very case upon which it relies, Edelman, found no such limitation inherent in Sec. 1983. See supra at 44. The analogy breaks down for the following additional reasons:

The Eleventh Amendment and Sec. 1983 are not parallel provisions adopted to accomplish identical objectives, one as to

states and the other as to municipalities. On the contrary, their origins and purposes are entirely different, indeed quite contradictory, so that there is no justification for transporting principles developed under one by "analogy" to the other.

The Eleventh Amendment was a negative provision, designed to withdraw from the federal courts a power which they were then exercising: the power to enforce monetary judgments against state treasuries. The Amendment's very purpose would have been undermined if such relief could be obtained through suits against state officials. However, as the wording of the Eleventh Amendment (withdrawing jurisdiction to entertain any suits against states) was broader than its purpose (to prevent suits for monetary

judgments), this Court has always recognized that suits might be brought against state officials for relief which impacts upon the state so long as the result is not a judgment for monies to be paid from the state treasury. Ex parte Young, 209 U.S. 123 (1908). From this evolved the line between prospective and retroactive relief articulated in Edelman, which the court below has now read into Sec. 1983 as controlling in suits affecting municipalities not protected by the Eleventh Amendment.

But Sec. 1983, unlike the Eleventh Amendment, was not a negative provision designed to withdraw federal power. On the contrary, it was an affirmative provision, creating a cause of action for victims of constitutional violations to recover complete relief from "every

person" -- a designation which, as the court below recognized, includes public officials in their official capacities. By its terms, it imposes no restrictions upon the relief obtainable in suits against "persons," and its purpose would be entirely undermined were the federal courts unable to direct officials to make whole the victims of constitutional violations committed by them.

The court of appeals, however, believed that a congressional intent to deny such relief could be found in the failure of Congress to include cities and counties among the "persons" subject to suit under Sec. 1983, Petition, A56-A60. The decision below misreads both the legislative history of Sec. 1983 and this Court's decision in Monroe v. Pape. In that case, this Court relied upon Congress'

rejection of the Sherman Amendment in 1871 for its conclusion that municipalities were excluded from Sec. 1983, Monroe v. Pape, supra, 365 U.S. at 188-192. But the rejection of the Sherman Amendment could lend support to the result below only if Congress was manifesting a desire to insulate municipal treasuries from monetary relief even where such insulation would negate the reasons for the enactment of Sec. 1983. A review of the legislative history shows, to the contrary, that other considerations -- some having to do with substantive dissatisfaction with the Sherman Amendment itself, and some having to do with a perceived want of constitutional power in Congress to impose policing obligations upon municipalities-- account for that Amendment's defeat. That history will not support a finding that

Congress desired to insulate municipal treasuries, and thus does not sustain an inference that Congress intended to limit the remedies obtainable against public officials.

The Sherman Amendment was not rejected because of a general desire to immunize all public funds from liability. The Republicans who defeated the Amendment in the House, */ and whose opposition

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*/ The Sherman Amendment was initially rejected by the House, Cong. Globe, 42nd Cong., 1st Sess. at 725, and rejected again by a vote of 106-74 in the House when reintroduced by the Conference Committee, Id. at 800-801. Republican defectors accounted for its defeat, as the bill was ultimately adopted by a vote of 93-64, with the margin of passage including the votes of many who had voted against the Amendment. Id. at 808. The Democrats, who voted against section 1983 both with and without the Sherman amendment, advanced other arguments grounded on their view that the national government could not and should not interfere with discrimination by local officials. Since that view was not controlling in the decision on the amendment, it is not controlling here.

ultimately led to its rejection, were concerned primarily with the fact that the amendment imposed vicarious liability on cities and counties for individual acts of lawlessness occurring within their borders, which they lacked the legal authority to prevent. */ For example, Representative Willard, a Republican, argued, inter alia,

> . . . the Constitution has not imposed, any duty upon a county, city, parish, or any other subdivision of a State, to enforce the laws, to provide protection for the people, to give them equal rights, privileges, and immunities. The Constitution has declared that to be the duty of the State. The Constitution, in effect, says that no State shall deny to its citizens the equal protection of the laws, and I understand that that declaration, that prohibition, applies only to the States, so far as political or municipal action is concerned. But the State, within its

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*/ The imposition of vicarious liability was a feature of the Amendment as originally proposed, Cong. Globe, 42nd Cong., 1st Sess. at 603, and as reported by the Conference Committee. Id. at 749.

boundaries, has the creation and the control of the laws for the protection of the people. What can the county do? What can the parish do? What can a city do, to give me the equal protection of the laws? The city and the county have no power except the power that is given them by the State. They cannot keep violence away from me; they cannot protect me in my rights, except as the State has clothed them with the power to do so; and for the enforcement of the laws of the State they get no aid, no authority, no power whatever from the United States. */

Representative Burchard urged:

> [W]here a State imposes a duty upon county officers or State municipal corporations, the exercise of which is necessary to give effect to judgments or decrees of the United States courts, the latter can enforce the performance of that duty. In other words, where by the laws of a State the board of supervisors of a county or the common council of a city, are authorized to levy a tax and collect funds to pay a judgment, for the purpose of enforcing satisfaction of the judgment,

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*/ Id. at 791.

the United States court, by mandamus can compel those State officers of a municipal corporation, to perform that duty.

But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations. Hence it seems to be that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance. */

The point then was one of fairness. Why should municipalities be liable for wrongdoing which only their parent states had legal authority to control? But to

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*/ Id. p. 795. See also Id. at 794 (remarks of Rep. Poland), Id. at 795 (remarks of Rep. Blair).

leap from the articulated intent to avoid that unfairness to an assumption that Congress also intended to avoid a remedy requiring officials to use their official powers to right a wrong which municipal authority alone empowered them to inflict is illogical.

To read the rejection of the Sherman Amendment as manifesting the intent here disputed is dubious also because the Congress of the period manifested a very different mind in its other actions regarding federal judicial power. Had Congress been concerned with protecting city treasuries as such, it would doubtless have acted to limit the diversity jurisdiction of the federal courts, under which, in the years after the Civil War, this Court and numerous lower courts had

compelled cities to levy taxes and pay out large sums of money on city bonds and other obligations. See, e.g. Von Hoffman v. City of Quincy, 71 U.S. 535 (1867); Butz v. The Mayor and Alderman of the City of Muscatine, 75 U.S. 575 (1869). Far from seeking to restrict such litigation to enforce the Contract Clause, Congress in 1875 adopted the predecessor of 28 U.S.C. Sec. 1331 establishing federal question jurisdiction and greatly increasing the number of instances in which such judgments against cities could be obtained.*/

The legislative history of Sec. 1983 thus provides no basis for disregarding the unequivocal and broad remedial authority conferred by the language of the

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*/ Lynch v. Household Finance Corporation, 405 U.S. 538, 548 (1972).

statute over defendant individuals. If, as was held in Monroe, Congress merely elected not to exercise its power to include cities and counties within the definition of "persons" liable to suit under Sec. 1983, that decision did not restrict the power of federal courts to require other and proper defendants to exercise "the power that is theirs" to remedy violations for which they are responsible.

III. The District Court Had The Power To Award Back Pay For Constitutional Violations Occurring After The Commencement of This Action

As the court of appeals correctly recognized,*/ the federal courts have unrestricted authority in an action under §1983 to award appropriate injunctive relief. This remedial power extends to preliminary injunctions and temporary restraining orders, as well as final injunctions. See Edelman v. Jordan, 415 U.S. 651, 656 (1974). Thus in a section 1983 action a district court has the power to afford complete relief, by way of injunction, for a violation occurring or continuing after the date on which the action was commenced. Having conferred upon the federal courts authority to remedy through an injunction pendente lite violations occurring or continuing between

*/ Petition, A53-55.

the filing of the complaint and the entry of final relief, Congress cannot have intended to foreclose to the Courts the less drastic and less burdensome option of permitting the disputed conduct to continue until final judgment and then awarding appropriate monetary relief for intervening injury.

The granting of a federal injunction against a state or local government, interfering with its normal operations, has traditionally been regarded as a remedy not lightly undertaken within our federal system. Rizzo v. Goode, 423 U.S. 362, 378-79 (1976); Younger v. Harris, 401 U.S. 37, 44-45 (1971). When the injunction is interlocutory in nature, the consequences can be even more serious, since there is usually no way to redress retrospectively any interim problems it may cause the defendants

if they ultimately prevail on the merits. Thus if in an employment discrimination case a federal court orders pendente lite that state or city officials hire or retain members of an alleged class, a subsequent decision on the merits that those class members were unqualified will only recognize, but could not remedy, difficulties occasioned by that interlocutory order. The out-of-pocket expense to a defendant of such interim injunctive relief will often exceed the monetary award where the plaintiffs are successful; that expense will always exceed the city or state's liability where the plaintiffs ultimately do not prevail. It is for such reasons that the equitable remedy of injunction has traditionally been unavailable where an adequate remedy at law for damages existed. Matthews v. Rodgers,

284 U.S. 521 (1932). In this and other litigation under §1983 it would, under ordinary circumstances, be a far less harsh interference with local prerogatives and principles of federalism to permit the defendants to continue, at their peril, the disputed practice, and provide appropriate monetary relief after the merits of the case were finally resolved. That is the approach that one would expect public defendants to prefer, and which, were monetary relief sufficient, equity would require. It is difficult to believe that Congress, in adopting section 1983, intended to restrict the federal courts to the form of relief for such an interim period which entailed the maximum interference with state and local officials.

A prohibition against the award of monetary relief for violations occurring

or continuing after the commencement would render irreparable virtually all injuries allegeable in a section 1983 action, and thus drastically expand the types of cases in which interim injunctive relief would be manadatory. In Sampson v. Murray, 415 U.S. 61, 88-91 (1974), this Court concluded that the unwarranted dismissal of a federal government employee would not ordinarily inflict irreparable injury, and thus necessitate the granting of a preliminary injunction, since full monetary relief would be available under the Back Pay Act if the employee were ultimately to prevail. If, as the court below held, no such monetary relief is ever available in a section 1983 action, all dismissals would necessarily involve irreparable injury; indeed, the holding below mandates the conclusion that any monetary injury in a

section 1983 case is irreparable. Such a rule would substantially increase the number of instances in which preliminary relief would be warranted and indeed required in civil rights litigation. Faced with such a proscription no conscientious attorney would fail to seek a temporary restraining order or preliminary injunction in a section 1983 case, or, if initially rebuffed, to renew that request repeatedly, since every day without preliminary relief would be another day of injury without a remedy. This restriction would thus obstruct the normal management of litigation and substantially increase the burdens on the federal courts as well as on the defendants.

However this Court may read the legislative history and purpose of section 1983, it is clear that prohibiting the

courts to grant monetary relief for violations occurring or continuing after the commencement of an action will tend to increase, rather than reduce, the burdens on state and local officials and treasuries. Congress could not have intended such a self-defeating result.*/

CONCLUSION

For the above reasons the decision of the Court of Appeals should be reversed and the case remanded for the entry of appropriate relief.

Respectfully submitted,

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*/ The monetary relief available under this argument would not be limited, as under our first argument, to actions against school boards; or, as under our second, to actions against policy making officials.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
No. 75-1914

JANE MONELL, et al.,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

On writ of certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS

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I

THIS COURT'S PRIOR HOLDINGS THAT CITIES AND COUNTIES ARE NOT "PERSONS" FOR PURPOSES OF 42 U.S.C. §1983 ARE SUPPORTED BY THE LEGISLATIVE HISTORY OF THAT SECTION AND, IN ANY EVENT, UNDER PRINCIPLES OF STARE DECISIS SHOULD BE ADHERED TO.

THERE IS NO REASON IN TERMS OF POLICY OR THE RELEVANT LEGISLATIVE HISTORY FOR TREATING SCHOOL BOARDS OR DISTRICTS DIFFERENTLY FROM CITIES OR COUNTIES UNDER SECTION 1983, AND THIS IS ESPECIALLY SO AS TO THE BOARD OF EDUCATION OF THE CITY OF NEW YORK..... 7

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BRIEF FOR RESPONDENTS

STATEMENT

On January 11, 1977, this Court decided Mt. Healthy City School District Board of Education v. Doyle, ___ U.S. ___, 97 S.Ct. 568, expressly leaving open for future determination the question of whether school districts and boards, like cities and counties,

are not "persons" within the meaning of 42 U.S.C. §1983. See 97 S.Ct. at 572.

Two weeks later, on the application of the instant petitioners, this Court granted certiorari to review the holding of the United States Court of Appeals for the Second Circuit (Pet., pp. A28-A70) that (1) the New York City Board of Education is not a person within the meaning of §1983 and (2) what would in effect be damages could not be awarded under §1983 against either the respondent Board of Education of the City of New York or the City itself by the device of naming as defendants in such a suit governmental officials sued only in their official capacities, and by the further device of characterizing such monetary relief as merely "equitable restitution."

The Court of Appeals, because of its

disposition of the appeal, did not reach arguments urged by the respondents (appellees there) that (1) assuming arguendo the existence of a right to such "equitable" relief, petitioners herein had failed to name as defendants the proper public officials and (2) this was not a proper case for class relief (see Brief of Appellees in Court of Appeals, Points III and V).

QUESTIONS PRESENTED

(1)

On the issue of whether the respondent Board of Education of the City of New York is a person within the meaning of §1983, petitioners urge (1) on the basis of numerous decisions wherein, without discussion of this issue, relief has been granted in §1983 actions against school boards or districts, that, under principles of stare decisis, such bodies should be held persons for this

purpose and (2) apparently accepting that such entities are as much creatures and governmental subdivisions of States as are cities and counties, that this Court's decisions on this issue in Monroe v. Pape, 365 U.S. 167 (1961), and Moor v. County of Alameda, 411 U.S. 693 (1973), were incorrect and the "unsupportable" reasoning of those cases (Petitioners' Brief, p.7) should not be extended to exclude school boards or districts from liability under §1983.

(2)

With respect to the issue of whether damages* may be awarded against governmental entities not persons within the meaning of §1983 by the device of allowing suits against

*We note that in their Amended Complaint (Appendix, 3-27) petitioners characterize the monetary relief they here seek as "damages," not any type of "equitable" relief (id. p.26). We also note that the Amended Complaint does not pray for "reinstatement" of any of the petitioners.

officials of such entities sued only in their official capacities, petitioners urge that (1) albeit without discussion, this Court has in past decisions approved such "equitable" relief (Petitioners' Brief, pp. 41-46) and (2) the authority to award such relief may and ought to be read into §1983 in order that it may fulfill its "central purpose" (id., p.50).

SUMMARY OF ARGUMENT

We urge in point "I" of our argument that (1) Monroe v. Pape and Moor were in fact correctly decided and in any event should be adhered to under principles of stare decisis; (2) school boards and districts generally, to the extent they are not deemed arms of the State, enjoying Eleventh Amendment immunity from suit, are governmental subdivisions of the States, exercising important governmental power,

and, accordingly, should be treated the same as cities and counties under §1983; (3) with particular reference to the Board of Education of the City of New York, such is its close relationship to the City of New York that there is no basis for treating it differently from the City itself.

In "II" we argue that acceptance of petitioner's argument for imposition of liability for "damages" on non-person governmental entities by the device of allowing officials thereof to be sued in their official capacity and the further device of characterizing such monetary relief as "equitable" would be (1) inconsistent with Monroe v. Pape and Moor; (2) inconsistent with the intent of the Congress that enacted §1983; and (3) contrary to sound considerations of justice and public policy. We recognize that prospective in-

junctive relief can in fact be obtained against such entities, but by analogy to the Eleventh Amendment cases we urge that monetary relief of the type here sought is improper.

ARGUMENT

I

THIS COURT'S PRIOR HOLDINGS THAT CITIES AND COUNTIES ARE NOT "PERSONS" FOR PURPOSES OF 42 U.S.C. §1983 ARE SUPPORTED BY THE LEGISLATIVE HISTORY OF THAT SECTION AND, IN ANY EVENT, UNDER PRINCIPLES OF STARE DECISIS SHOULD BE ADHERED TO.

THERE IS NO REASON IN TERMS OF POLICY OR THE RELEVANT LEGISLATIVE HISTORY FOR TREATING SCHOOL BOARDS OR DISTRICTS DIFFERENTLY FROM CITIES OR COUNTIES UNDER SECTION 1983, AND THIS IS ESPECIALLY SO AS TO THE BOARD OF EDUCATION OF THE CITY OF NEW YORK.

(1)

Twice before this Court has considered in detail the legislative history of the Ku Klux Act of 1871, what is now 42 U.S.C. §1983. Based upon such consideration, it has determined that it was not the inten-

tion of the Congress that enacted this statute that it should impose liability on governmental subdivisions of States. See Monroe v. Pape, supra; Moor v. County of Alameda, supra; see, also, City of Kenosha v. Bruno, 412 U.S. 507 (1973).

We believe that those readings of the relevant legislative history are fully supported by the record of the congressional debate on the Sherman Amendment. That debate reveals at least two distinct strains to the argument against imposition of such liability: One, at least certain members were concerned about the effect imposition of such liability would have on municipal treasuries. See City of Kenosha v. Bruno, supra, 412 U.S. 507, 517-519 (Douglas, J., dissenting). Two, other members were concerned that Congress did not possess the power to impose such liability upon political

subdivisions of the States. See Monroe v. Pape, supra, 365 U.S. 167, 190; Moor v. County of Alameda, supra, 411 U.S. 693, 708. This reading of §1983 is supported not only by its legislative history,* but also by the principle of stare decisis.**

We appreciate, as this Court has, the

*This reading of the legislative history is supported by other evidence as well. See "The Supreme Court, 1972 Term," 87 Harv. L. Rev. 1, 257 n.29 (1973). As is also there noted, in Monroe v. Pape this Court expressly rejected the "Dictionary Act" argument which is tendered anew in this case. See 365 U.S. at 190-191.

**As noted, in Monroe v. Pape and Moor this issue was explored in depth. In neither Monroe v. Pape nor Moor, nor in City of Kenosha v. Bruno, was there even a single dissent on this issue. In the 16 years since Monroe v. Pape was decided, Congress, although it has been most active in the field of civil rights, has not chosen to amend §1983 to include State subdivisions as persons under that statute. Cf. Illinois Brick Co. v. State of Illinois, __U.S.__, 45 U.S.L.W. 4611, 4615 (1977).

distinction between the type of strict liability which would have been imposed on municipalities by the amendment proposed by Senator Sherman (see Monroe v. Pape, supra, 365 U.S. 167, 188 n. 38), as well as its later proposed version (id., pp. 188-189 n.41) and the situation where a municipality would be held liable on the basis of traditional principles of respondeat superior (compare Moor v. County of Alameda, supra, 411 U.S. 693, at 698-702). Moreover, we do not here question the power of Congress to impose liability on governmental subdivisions of States on such a theory for civil rights

violations committed by their employees.* Nonetheless, as this Court noted in Moor, the legislative history of this Act indicates that "the House arrived at the firm conclusion that Congress lacked the constitutional power to impose liability upon municipalities..." (411 U.S. at 709), and, in any event, the proposal to impose liability upon towns and counties was "rejected in toto" (id., at 710).

Either no such middle ground resolu-

*Although we do not believe this distinction is here critical, it should be noted that in this case petitioners do not seek merely imposition of vicarious liability for "torts" committed by public officials who would themselves be personally liable to petitioners; petitioners concede that none of the individual respondents could be held personally liable to them. Compare Monroe v. Pape, supra, where the individual police officers were themselves charged with tortious conduct. Instead, petitioners seek imposition here of a type of strict liability, different from that which would have been imposed under the Sherman Amendment, but which is still a species of strict liability which would operate most harshly.

tion of the question of municipal liability under the then proposed act occurred to the Congress, or, if it did occur to it, such "solution" was rejected. And, indeed, the legislative debate quoted by Mr. Justice Marshall in footnote 24 of his opinion in Moor (at pp. 708-709) appears clearly to suggest that even had such a middle ground solution occurred to that Congress, the House members would have viewed it as still beyond the power of Congress. See, also, Monroe v. Pape, supra, 365 U.S. 167, at 190, quoting Representative Poland:

> "'[T]he House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.'" (Emphasis supplied.)

(2)

With respect to the question of whether

school districts or boards should enjoy the same "non-person" status for purposes of §1983 as do cities and counties, we would note initially that where, as here, the defendant school board is funded directly out of a municipal treasury there is presented an a fortiori case for non-liability based on the congressional concern for municipal treasuries which Mr. Justice Douglas has stressed in his reading of the legislative history of §1983. See infra, pp. 18-22. However, on the level of what would appear to have been a more fundamental concern of that Congress, we would note that there is absolutely no basis in terms of the 1871 Congress's view of the limited reach of its power over State subdivisions for distinguishing between school boards and districts and other State subdivisions.

Clearly, while school boards and dis-

tricts may not, within the meaning of the Eleventh Amendment, be "arm[s] of the State" (Mt. Healthy City School District Board of Education v. Doyle, supra, 97 S.Ct. at 572), like cities and counties, they are creatures and agencies of the State, as a means of exercising its political power, and they fulfill an important governmental role.* As such, under the theory of constitutional limits on congressional power which in-

*See, generally, concerning the status of school boards and districts under the laws of the various States, 16 McQuillin, Municipal Corporations §46.03. It should be noted that in National League of Cities v. Usery, 426 U.S. 833 (1976), this Court did not distinguish between schools (and hospitals) and other governmental subdivisions of States. See id. at p. 855. On the contrary, the Court specifically noted that such entities provide "an integral portion of those governmental services which the States and their political subdivisions have traditionally offered their citizens." Id. Cf. Village of Kenmore v. County of Erie, 252 N.Y. 437, 442, 169 N.E. 637, 639 (1930) ("School districts are, like counties, governmental subdivisions of the State, though their function is confined to education").

fluenced the Congress that enacted §1983, there is no basis for distinguishing between this type of State subdivision and cities and counties, and the legislative history quoted by Mr. Justice Marshall in Moor clearly supports such a view. See 411 U.S. 693, 708 n. 24.* Moreover, any other view would create chaos and confusion in the law, and invite constant litigation on the question of whether a particular public education entity is or is not a "person" for purposes of §1983. In terms of logic, adherence to legislative intent and considerations of policy, we can see no reason for

*As is there indicated, Representatives Kerr, Willard and Poland uniformly believed that the power of Congress to act in this matter extended only to individuals, not subdivisions of the States. And it is noteworthy that they spoke most broadly when discussing such subdivisions. Thus, for example, Representative Willard referred to "a county, city, parish, or any other subdivision of a State" (id., p.708).

treating such entities any differently from towns, cities and counties for purposes of §1983. And neither petitioners nor the amici here have suggested any basis for such a distinction -- other than blind adherence to precedents where this issue was not considered and their belief that Monroe v. Pape and Moor were improperly decided and should not be extended.

Insofar as precedent and the doctrine of stare decisis are concerned, this Court has already indicated quite clearly that this question has yet to be definitively decided by it. See Mt. Healthy City School District Board of Education v. Doyle, supra, 97 S.Ct. 568, 572. Furthermore, it has also indicated the slight precedential weight to be accorded earlier cases involving issues of this sort where such issues were not raised either by the parties or the Court.

See Monroe v. Pape, supra, 365 U.S. 167, 191 n. 50; see, also, City of Kenosha v. Bruno, supra, 412 U.S. 507, 512-513. Compare Edelman v. Jordan, 415 U.S. 651, 670-671 (1974).

If this Court feels that Monroe v. Pape, Moor and City of Kenosha were properly decided, in accordance with the intentions of the Congress that enacted this statute (cf. Moor v. County of Alameda, supra, 411 U.S. 693, 709), then, we submit, there is no avoiding here the reach of the analysis employed in those decisions to encompass school boards and districts.*

---

*In the point that follows we discuss the policy considerations which support the result which we here urge as to both school boards and other governmental subdivisions. We would note here, however, that we are aware of no important holding of this Court in the field of public education which would have been barred by adoption of the rule we urge.

Entirely apart from what we have said in regard to school boards and districts generally, we submit that the respondent Board of Education of the City at New York is so clearly part and parcel of the City itself as to require the same exclusion from §1983 as the City itself.

Fiscally, the Board is clearly nothing but another department of City government. It has no independent taxing authority or authority to issue bonds, and it is through the City Expense and Capital budgets that the Board's operations and growth are funded.

Moreover, the City's relationship with the Board of Education goes far beyond merely the question of fiscal affairs. The Board is included in the City Charter as one of the board's or departments of City government.

See New York City Charter, §§520-527. Its members are appointed by the mayor (two) and the five borough presidents (one each). Education Law §2590-b(1)(a). Title to property used for the Board's purposes is vested in the City. New York City Charter §5[illegible]1. The Board is required to submit yearly reports to the mayor. Id. §522. Its members may be removed by the mayor for cause following a hearing. Id. §523. The City's chief law officer, the corporation counsel, represents the Board. See Matter of Kingsport Press v. Board of Education of the City of New York, 52 Misc 2d 276, 277-278 (Sup. Ct., N.Y. Co., 1966). And the City's Commissioner of Investigation (see City Charter §801 et seq.) is authorized to investigate charges of or suspected wrongdoing in the conduct of the Board's affairs. Karelsen v. Wagner, 59 N.Y.S. 2d 683 (Sup. Ct., N.Y. Co., 1945).

In addition, while for educational and pedagogical purposes the Board is considered an agency of the State (Matter of Maloff v. City Comm'n. on Human Rights, 38 NY 2d 329, 332, 342 N.E. 2d 563, 565 [1975]; Lanza v. Wagner, 11 NY 2d 317, 326, 183 N.E. 2d 670, 675 [1962]), for other purposes the Board has been treated as a department of City government. See Matter of Maloff v. City Comm'n. on Human Rights, supra, 38 NY 2d 329, 332-333, 342 N.E. 2d 563, 565; Daniman v. Board of Education, 306 N.Y. 532, 541-543, 119 N.E. 2d 373, 379 (1954), rev'd on other grounds sub nom. Slochower v. Board of Education, 350 U.S. 551 (1956); Matter of Hirshfield v. Cook, 227 N.Y. 297, 125 N.E. 504 (1919).

In short, while this is a separate corporate entity, for certain purposes independent of the City's control (and for

others subject to it), it is clear that the relationship between the Board of Education and the City is most close, and that this is especially so in fiscal matters. Quite clearly, if what are in effect money judgments are to be allowed in §1983 actions against this respondent, such judgments will ultimately be paid by the City's taxpayers out of the City treasury. Such a result would be, we believe, altogether inconsistent with Mr. Justice Douglas's reading of the legislative history of §1983. See City of Kenosha v. Bruno, supra, 412 U.S. 507, at 517-519. And, perhaps more fundamentally, it would be inconsistent with the view that this section was not intended to reach governmental subdivisions of the States. See Moor v. County of Alameda, supra, 411 U.S. 693, at 708 note 24; Monroe v. Pape, supra, 365 U.S. 167, at 190. Compare Vil-

lage of Kenmore v. County of Erie, supra, 252 N.Y. 437, at 442, 169 N.E. 637, at 639.

To the extent that this entity may be viewed as part of the City's government it should be held to share in the City's immunity from suit under §1983. To the extent the Board is viewed as separate from the City, we would note that boards of education have been compared to counties by the New York Court of Appeals (id.), and both that court (id.) and this Court have recognized that such entities perform a significant governmental function (National League of Cities v. Usery, supra, 426 U.S. 833, at 855).

Accordingly, while we here urge that boards of education and school districts generally should be viewed as not persons for purposes of §1983, we urge most strongly that, whatever view may ultimately be adopted

as to such entities generally, in this case the New York City Board of Education should be held, like the City of New York itself, not a person for purposes of §1983.

II

CONSISTENT WITH THE PREVIOUSLY EXPRESSED VIEW OF THIS COURT THAT §1983 SHOULD BE ENFORCED AS THE CONGRESS THAT ENACTED IT INTENDED IT TO BE ENFORCED, AND AS THAT VIEW HAS BEEN ACQUIESCED IN BY CONGRESS, THAT STATUTE SHOULD NOT BE HERE ENFORCED SO AS TO ALLOW WHAT WOULD BE IN EFFECT DAMAGE AWARDS AGAINST STATE SUBDIVISIONS.

(1)

In both Monroe v. Pape and Moor this Court indicated that §1983 should be construed in accordance with the intention of the Congress that enacted this statute. In both of those cases this Court squarely held that that Congress did not intend to impose liability under the Act on subdivisions of States. This holding of Monroe v. Pape is crystal clear. In the 16 years

since that case was decided Congress has not chosen to legislatively overrule that holding. Compare Illinois Brick Co. v. State of Illinois, supra, 45 U.S.L.W. 4611, at 4615.

Notwithstanding those clear holdings, petitioners urge that §1983 should be construed so as to directly frustrate that congressional intent. Very respectfully, we submit that for this Court to so construe this statute would not only be violative of the principle of stare decisis, but also it would constitute a usurpation of the legislative function. See Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. 527, 533 (1947). Moreover, we submit, such a construction of §1983 would make bad law.

Increasingly, this act, known as the Ku Klux Act and directed against outright

criminal behavior, as well as invidious State legislation and the failure of the States to provide adequate remedies (Monroe v. Pape, supra, 365 U.S. 167, at 172-174), has been utilized by this Court and the lower federal courts to announce new standards of what the due process and equal protection guarantees require. Most often in recent years the official conduct complained of was not motivated by any criminal or invidious purpose, and in many instances, such as was here the case, the challenged conduct "no doubt represent[ed] a good-faith attempt to achieve a laudable goal" (Cleveland Board of Education v. LaFleur, 414 U.S. 632, 648 [1974] [like this case involving the issue of mandatory maternity leave]).

Under these circumstances, where declaratory and prospective injunctive relief, including preliminary injunctive relief,

is available against public officials sued in their official capacities, and in certain cases such officials may themselves be cast in damages for violations of §1983 (see, generally, Wood v. Strickland, 420 U.S. 308 [1975]), we believe it is entirely appropriate that §1983 should not be allowed to be used as a means of recovering judgments payable out of local governmental treasuries, but rather should be confined in its application within the limits to which this Court has repeatedly indicated it should be kept.*

*The availability of preliminary injunctive relief in a §1983 action, with an appeal as of right being available where the district court denies such relief (28 U.S.C. §1292(a)(1)), certainly undercuts petitioners' argument that a retroactive monetary award is essential if §1983 is to achieve its "central purpose" (Petitioners' Brief, p. 50). Any party who feels aggrieved by some official action may apply for preliminary injunctive relief and, if he can make the requisite showing, he or she should obtain it. In addition, it might be noted that the unavailability of monetary awards against the States has not significantly deterred parties from seeking relief under §1983 against State officials.

So confined, §1983 is not stripped of its vitality; it may still be used as a potent "sword, rather than merely as a shield" (Edelman v. Jordan, supra, 415 U.S. at 664) against wrongdoing or error on the part of public officials -- without, however, causing injustice.

In effect, under this Court's decisions construing and applying §1983 there have been recurrent "sunbursts" (see Great Northern Ry. v. Sunburst Oil and Refining Co., 287 U.S. 358 [1932]), where this Court, functioning very much like a traditional common law court, has announced new rules of law. Under such circumstances it is essential that §1983 be applied in a fair and balanced fashion so that the rights and obligations of plaintiffs and defendants may be equitably determined and injustice avoided. Compare Schaeffer, "Precedent and Policy," 34 U. of

Chi. L. Rev. 3, 14-18 (1966). At root, this appears to be the concern which has animated a number of this Court's decisions construing §1983, see, e.g., Wood v. Strickland, supra, 420 U.S. at 316-322; Imbler v. Pachtman, 424 U.S. 409 (1976), and, while the immunity we here seek for governmental subdivisions is different in kind from the qualified immunity discussed in Wood v. Strickland, this is merely another means of arriving at a result which, on balance, would appear just and appropriate. Moreover, it is the type of immunity which in another context this Court only recently held, based upon traditional common law and public policy considerations, should be provided to a §1983 defendant. See Imbler Pachtman, supra (absolute prosecutorial immunity). More importantly, recognition here of such an immunity from liability under

§1983 does not require engrafting onto this statute any common law exception to liability (compare Imbler v. Pachtman, supra, 424 U.S. at 417-419); rather, it merely requires that the statute not be contorted to avoid the clear intent of the Congress that enacted it. Clearly, we submit, the analogy here to Edelman v. Jordan, supra, 415 U.S. 651, is most compelling. By applying that analogy to §1983 suits against officials of State subdivisions the intent of Congress can be served and injustice avoided.

(2)

In arguing for recognition of such immunity we are aware that (1) there is respectable judicial authority to the contrary (see, e.g., Muzquiz v. City of San Antonio, 528 F. 2d 499, 501-503 [5th Cir., 1976], pet. for cert. pending [Tuttle, J., dissenting]) and (2) the precise scope of

the protection accorded by such immunity from suit may not always be perfectly clear (see, e.g., id. at 503-504 [Thornberry J., concurring and dissenting]; id. at 504-505 [Godbold, J., concurring and dissenting]; compare Edelman v. Jordan, supra, 415 U.S. 651, at 667).

With respect to the first of these points, we would simply note that such authority, where it is reasoned at all, totally ignores the legislative history of §1983 and the intent of the Congress that enacted this statute (see, e.g., Judge Tuttle's Muzquiz dissent), which intent this Court held in Monroe v. Pape and Moor had to be given effect in construing §1983.

With respect to the second problem, determining the scope of the protection accorded, we acknowledge that in particular

cases this issue may present difficulty.* But such difficulty does not excuse giving effect to the intent of Congress, and in fact is not insuperable. Indeed, we believe, the guide for resolution of this issue is already available, furnished by the Eleventh Amendment cases, where this Court has recognized that orders may be entered against State officers which have impact on State treasuries (Edelman v. Jordan, supra, 415 U.S. at 667), but has held that such orders are limited to "prospective injunctive relief" (id. at 677) and "may not include a retroactive award which requires the pay-

*In this case no such difficulty is presented. In their amended complaint petitioners quite properly characterize the monetary relief they seek as "damages" (Appendix, p.26), and quite clearly the "equitable" order they now seek would be "tantamount to a money judgment" (Muzquiz v. City of San Antonio, supra, 528 F. 2d at 501). Compare Edelman v. Jordan, supra, 415 U.S. at 668.

ment of funds from the state treasury" (id.).

The very same approach would be appropriate here; it would both respect the intent of Congress and not render meaningless this Court's decisions in Monroe v. Pape and Moor. Moreover, it is an approach which by and large would do justice.

Just as public officials have not been required to be prophets with respect to further refinements in constitutional law, and have been accorded varying degrees of immunity from awards for damages based on their official acts, municipalities and similar governmental entities should be protected from liability for acts performed by their officers and employees pursuant to long accepted policies which only much later have been held to be unconstitutional.

Concededly, not all acts of public officials have been as innocent as those

involved here, and in the case of wrongful acts committed by such officials within the scope of their employment, where such officials would themselves be liable, an argument could be made for the imposition of respondeat superior liability. However, we believe such cases are in fact the exception, in a situation where what is called for is a rule of general application. Cf. Imbler v. Pachtman, supra, 424 U.S. 409. And, in any event, as we have noted, no such middle ground approach to the question of municipal liability was adopted by the Congress that enacted §1983. See Moor v. County of Alameda, supra, 411 U.S. at 710. Accordingly, to the extent this was not already done in Monroe v. Pape and Moor, should this Court in this case determine that it must announce a general rule on the issue of liability of governmental subdivisions

under § 1983 for acts of their employees, both innocent and wrongful, then we submit that it has no logical alternative other than to announce here a rule of absolute immunity.

Truly, there has taken place in this country in the past quarter-century a revolution in the field of civil rights, and a most welcome revolution. But that revolution should not exact from hard pressed localities and their limited treasuries retribution for past acts which were by and large generally considered perfectly lawful and over which, as a practical matter, citizens and taxpayers had little control.

Both "common-law tradition" and "strong public policy reasons" (Wood v. Strickland, supra, 420 U.S. at 318), as well as precedent and the intent of Congress, counsel here against allowing in a § 1983 action relief

of the sort which these petitioners seek. Quite to the contrary, all of these considerations argue for this Court's holding that under §1983 State subdivisions enjoy an immunity from suit similar to the immunity from suit enjoyed by the States under the Eleventh Amendment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

July 11, 1977

Respectfully submitted,

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FOR ARGUMENT.

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1914

JANE MONELL, *et al.*,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES,
OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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STATEMENT

In substantial part defendants' argument rests on mischaracterizations of plaintiff's position. Thus, the correctness of this Courts' prior holdings in Moore v. County of Alameda* and Monroe v. Pape** are not here at issue. Compare Brief for Respondents at 7-11, 24, with Brief for Petitioners at 14, 25-27, 37-41, 68. Nor do plaintiffs seek to "render meaningless" the results reached in Monroe and Moore, compare Brief for Respondents at 32 with Brief for Petitioners at 33-34.

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* 411 U.S. 693 (1973).

** 365 U.S. 167 (1961).

I. THE EXISTENCE OF AN IMMUNITY BASED ON GOOD FAITH IS NOT BEFORE THE COURT

The other major argument asserted in defendants' brief is that local governmental entities and officials are immune from liability under §1983 because of their presumed good faith, Brief for Respondents at 32-35. As to this wholly new argument plaintiffs need only state that the question of whether such an immunity does or does not exist was not within the scope of the question as to which certiorari was granted. The only issue presented in that question is whether the various defendants are "persons" when a back pay award is sought against them.***

*** Petition at 8.

Whether that question is jurisdictional (as the Court of Appeals conceived of it, Petition, A60, A68) or one going to the remedial authority of the federal courts (as asserted by plaintiffs, Brief at 35) it is clear that the good faith of the defendants and any ensuing immunity is irrelevant to it.

Moreover, an immunity defense sounding in good faith was not included in the Answer, was not previously raised below, and is, therefore, an issue as to which plaintiffs have neither had occasion to conduct discovery nor to brief below. To allow it to be raised at this stage of the litigation would be most unfair, c.f. Federal Rules of Civil Procedure, Rule 8(c).

II. RELIEF IS AUTHORIZED AGAINST DEFENDANT BOARD OF EDUCATION

At the same time that defendant Board of Education has been arguing in this Court that it is "nothing but another department" of the City of New York,* it has been vigorously litigating a serious monetary claim against the City and has, indeed, won a victory against it.**

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* Brief for Respondent at 18.

** Board of Education v. City of New York, 41 N.Y. 2d 535, ____ N.E. 2d _____, 394 N.Y.S. 2d 148, (1977) (Stavisky-Goodman law requires City to increase the proportional share of its budget allotted to the Board of Education; Court of Appeals also reaffirms its view that educational matters are) exempt from the "home rule" provisions of the New York Constitution which define the sphere within which municipal law governs exclusively, Id. at 41 N.Y. 2d 542, 394 N.Y.S. 2d at 154, _____ N.E. 2d_____).

In its Verified Petition in its action against the City, the Board described itself as follows:

> 1. Petitioner Board of Education of the City School District of the City of New York (hereinafter "Board of Education") is a body corporate created by and existing under the laws of the State of New York and charged by the State with the administration of the educational system in the City of New York (hereinafter "City").* (emphasis added)

The truth of the quoted allegations was admitted by the City in the Verified Answer by which it responded to the Board's petition.**

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* Verified Petition, Board of Education of the City School District of the City of New York v. City of New York, Docket No. 12011/76, Supreme Court, New York County, at 2 (July 1, 1976).

** Verified Answer, Board of Education v. City of New York, supra at Para. 1 (July 26, 1976).

In the legislative arena, Mayor Beame, a defendant in this action, has in recent months sought the abolition of the Board of Education and its replacement with a commissioner appointed directly by him.* In explaining his proposal, the Mayor stressed the independence of the Board. In a prepared statement, he said:

> "In theory the board is a representative body, insulated from political pressures, able to dedicate itself exclusively to the welfare of the City's school children and teachers. In reality the board -- insulated only from the City's central government -- is subjected to internal pressures so overwhelming as to be nearly irresistible.**

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* N.Y. Times, May 3, 1977, p.1, col.1.

** Id. at p.72, col. 3 (emphasis added)

The response of the Board of Education to the Mayor's proposal was negative. Said Robert J. Christen, President of the Board:

> "[W]e would most certainly resist the destruction of an independent school system. We have respectfully disagreed with the Mayor before and will continue to do so."***

*** Id. (emphasis added).

It appears that the Board and City have in other forums characterized their relationship in terms quite different from those they have expressed to this Court. Be that as it may, plaintiffs must accept defendant's argument here at face value. Despite the long-held view that the Board of Education is:

> ...not a department of the City government, it is an independent corporate body and may sue and be sued in its corporate name.*

the defendant argues that suit against

* Divisich v. Marshall, 281 N.Y.170, 173, 22 N.E. 2d 327, 328 (1939). See also, People ex rel. Wells & Newton Co. v. Craig, 232 N.Y. 125, 135, 133 N.E. 419, 422 (1921); N.Y. Education Law §2551.(Footnote con't on page 8a)

the Board under section 1983 is the same as a suit against the City. Only three

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- Continuation of Page 8 Footnote

The word "person" in section 1983 of course includes corporations as well as natural persons. Certainly that was the legal meaning of the word in 1871 just as it is today, see, e.g. Pembina Mining Co. v. Penna., 125 U.S. 181, 189 (1888); Beaston v. Farmers' Bank of Del., 37 U.S. (12 Pet.) 102, 134-135 (1838). There is no indication that Congress intended the term to be understood in any but its usual sense in section 1983.

cases are cited for this proposition, one of which holds that the Board is subject to the jurisdiction of the New York City Commission on Human Rights,* the second holding that teachers could be considered City employees within the meaning of a state law requiring them to testify before a Legislative Committee, ** and a third holding that the Board of Education was subject to

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* Matter of Malcff v. City Comm'n on Human Rights, 38 N.Y. 2d 329, 342 N.E. 2d 563 (1975).

** Daniman v. Bd. of Educ., 306 N.Y. 532, 119 N.E. 2d 373 (1954) rev'd on other grounds sub nom. Slochower v. Bd. of Educ., 350 U.S. 551 (1956).

audit by the Commissioner of Accounts of the City of New York.*

These cases establish a proposition which is not in dispute; the Board of Education is subject to some types of control by the City (just as are private entities located within the City borders). In so holding, two of these cases rely on a finding that the Board is "a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the City Treasury."**

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* Matter of Hirshfield v. Cook, 227 N.Y. 297, 125 N.E. 504 (1919).

** 7 Admin. Code of the City of New York § 1150-1.0. Subd. 1. See Daniman v. Bd. of Educ., supra; Maloff v. Comm. of Human Rights, supra.

Plaintiffs have never denied that the Board receives some of its funds from the City. This is not the same as saying that for fiscal purposes the City is the Board, if only because the Board also receives substantial funds from other sources,* a key fact which the court of appeals overlooked.**

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* The total Board of Education budget for FY 1976 was $2,758,169,809. Of this, $810,150,635. was contributed by New York State and $293,617,644. by the federal government. The remainder was provided principally by the City from its tax revenues, Expense Budget [of the City of New York] for the Fiscal Year 1977, published as a supplement to the City Record, Official Journal of New York City (June 16, 1976) at 198.

** The court of appeals said:

> All funds for use of the Board of Education must be appropriated by the city.
>
> - Petition, A49-

This error figured so prominently in the reasoning by which the court reached its decision that it alone requires reversal.

When defendant asserts* (without citing any authority) "such judgments [against the Board] will ultimately be paid by the City's taxpayers out of the City Treasury", it appears to be engaging in sophistry, as the money would come out of the City Treasury only in the sense that the City holds the board's money for the latter and must pay it over upon the latter's order.** No additional appropriation to the Board would be required. Thus, in a case resting upon the distinction for financial purposes between the two bodies, it

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* Brief for Respondent, at 21.

** N.Y. Education Law § 2580; People ex rel. Wells & Newton Co. v. Craig, supra, 232 N.Y. at 137-139.

was held that a suit against the Board could not be dismissed on the ground that the plaintiff failed to comply with statutory notice of claim provisions applicable to claims against the City; nor could the Comptroller of the City refuse to pay an account approved by the Board.***

*** People ex rel. Wells & Newton Co. v. Craig, supra. See also Petition of the Board in Board of Education v. City of New York, supra at ¶ 5 in which the Board alleged:

> 5. Respondent Harrison J. Goldin, as Comptroller of the City, administers the expenditure of City funds and, among other things, has the obligation to make payments to or on behalf of the Board of Education from the funds appropriated to the Board of Education in the annual expense budget adopted by the City.

The truth of this allegation was admitted by the City in its Verified Answer, Id at ¶ 1.

Thus it is not the case that this suit against the Board is, in effect, a suit against the City.

CONCLUSION

For the above reasons the decision of the Court of Appeals should be reversed and the case remanded.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1914

JANE MONELL, *et al.*, *Petitioners*,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AS AMICI CURIAE

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE [1]

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.5 million educators, virtually all of whom are employed by public educational institutions. One of NEA's purposes is to safeguard the constitutional rights of teachers and other public educators.

[1] The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 42(2) of the Rules of this Court.

The Lawyers' Committee for Civil Rights Under Law is a non-profit corporation organized in 1963 at the request of President Kennedy. Its Board of Trustees includes nine past presidents of the American Bar Association, two former Attorneys General, and two former Solicitors General of the United States. The Committee's primary mission is to involve private lawyers throughout the country in the quest of all citizens to secure their civil rights through the legal process.

The resolution of this case will have an important impact upon the extent to which those who are injured by the unconstitutional actions of public officials and entities can secure complete relief in the federal courts. Both *amici* have a vital interest in the resolution of this case.

This brief is filed to provide the Court with the views of *amici*, refined through extensive litigation under the Fourteenth Amendment and 42 U.S.C. § 1983, that actions can be maintained under § 1983 against public officials in their official capacities and against school boards to secure complete relief, including relief which impacts upon the public treasury.

SUMMARY OF ARGUMENT

Plaintiffs brought this action under § 1983 against a school board, a city department, and various public officials in their official capacities, alleging that these defendants had violated plaintiffs' rights by requiring them to stop working during their last two months of pregnancy. Cf. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 638 (1974). As remedies, plaintiffs sought declaratory and injunctive relief (now

moot, because defendants have rescinded the policies which required pregnant employees to stop working), and payment of the salaries which they would have received but for the unconstitutional interruption of their employment.

The court below held that there is no federal jurisdiction over this action under 28 U.S.C. § 1343(3), because none of the defendants is a "person" who may be sued under § 1983. More precisely, the court held that the school board and city department can never be "persons" under § 1983, and that public officials in their official capacities are "persons" when sued for declaratory and injunctive relief, but are not "persons" when sued for retroactive monetary relief.

In Part I-A of this brief, we show that the court erred in holding that the public officials are not "persons" when sued for monetary relief under § 1983. Public officials in their official capacities are either "persons" suable under § 1983 or they are not. There is no basis for bifurcating their "person" status depending on the nature of the relief sought. *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). This Court has entertained and approved relief in numerous § 1983 cases against public officials in their official capacities. A finding, implicit or explicit, that such defendants are "persons" suable under § 1983 was a necessary predicate to this Court's resolution of those cases, particularly in light of this Court's duty *sua sponte* "to see to it that the jurisdiction of the [district court] . . . is not exceeded." *City of Kenosha* v. *Bruno*, *supra*, 412 U.S. at 511. Moreover, Congress has closely scrutinized these § 1983 decisions and has evinced no dissatisfaction with the definition of "persons" established therein. Too many important decisions of this Court have proceeded on the premise

that public officials in their official capacities are "persons" under § 1983 for the question to be considered other than settled. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306-307 (1962). It follows that there *was* jurisdiction under 28 U.S.C. § 1343 to entertain the monetary claim against the public officials.

Of course, even though there be jurisdiction over the claim, it would be defeated on its merits if it could be shown that Congress intended in § 1983 to restrict the forms of relief available against this category of "persons" so as to preclude monetary relief which would be paid from the public treasury. While the Court below did not address this "merits" issue, we go on in Part I-B to show that Congress did *not* intend to restrict the scope of available relief in this fashion. On its face, § 1983 creates a cause of action for "redress" by the "party injured" against "every person" violating constitutional rights, and creates the broadest possible avenue to relief: through "an action at law, suit in equity, or other proper proceeding." These words do not admit of the interpretation that Congress meant the "injured party" to go without "redress" when the injury is monetary and the wrongdoing "persons" are public officials. By logic, if Congress in enacting § 1983 had intended "to protect municipal treasuries," as the Court below stated, then it would have permitted no award against public officials which impacts on municipal treasuries. But, this Court has already decided in numerous cases that relief may be granted against public officials in their official capacities, and Congress has accepted, indeed built upon, these decisions. Further, the Eleventh Amendment "analogy" to which the court below refers, has no application here. The line drawn in Eleventh

Amendment cases between prospective and retroactive relief is a product of this Court's effort to reconcile competing constitutional interests; it makes no sense as a means to determine the intent of the 1871 Congress in enacting § 1983, and in fact leads to a distortion of the manifest congressional purpose. The importation of the Eleventh Amendment line into § 1983 would contravene the central purpose of § 1983—to provide a complete federal remedy for federal constitutional wrongs committed under color of state law—without serving any other purpose which the Congress that enacted § 1983 meant to achieve. The enactors did not intend to insulate municipal treasuries from suits to remedy constitutional wrongs. We detail the legislative history which proves this.

In Part II, we show that the court below also erred in holding that school boards are not "persons" under § 1983. As consistently as this Court has treated other governmental entities as outside the ambit of § 1983 and § 1343(3), so equally consistently (and in far greater volume) has this Court treated school boards as within the ambit of those provisions. In case after case, particularly in the school desegregation area, this Court has entertained § 1983 actions in which school boards were defendants, and indeed has on numerous occasions issued, directed, or approved orders in such cases against school boards. Congress has followed these decisions closely and has assumed from these decisions, and acted upon the assumption, that school boards are subject to suit by private parties. In 1964, 1972, and 1974, Congress enacted into law statutes founded on that assumption. In addition, Congress has failed to enact bills introduced from time to time to withdraw or limit federal court jurisdiction to entertain suits against school boards. In

the light of this history, the question whether school boards are "persons" under § 1983 must be regarded as settled in the affirmative. See *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 306-307; *Flood* v. *Kuhn,* 407 U.S. 258, 282-284 (1972). It follows that there was jurisdiction under 28 U.S.C. § 1343 to entertain the monetary claims against the school board, and that on the merits such relief may be awarded, where appropriate, under § 1983.

ARGUMENT

I. PUBLIC OFFICIALS IN THEIR OFFICIAL CAPACITIES ARE "PERSONS" WITHIN THE MEANING OF SECTION 1983. NO MATTER WHAT RELIEF IS SOUGHT AGAINST THEM. WHEN PUBLIC OFFICIALS USE THE POWERS OF THEIR OFFICE TO VIOLATE CONSTITUTIONAL RIGHTS, THEY MAY BE ORDERED TO USE THE POWERS OF THEIR OFFICE TO REMEDY THEIR VIOLATIONS EVEN THOUGH THE PUBLIC TREASURY BE IMPACTED.

As we understand it, the theory of this action, insofar as it is directed at public officials in their official capacities, is as follows: when public officials, exercising the powers of their office, violate the federal Constitution and thereby injure private parties, the injured parties may sue under § 1983, and the court is empowered to require the wrongdoing officials to exercise "the power that is theirs"[2] to repair the injury done—here, to pay the back salaries which plaintiffs would have received but for the officials' unconstitutional actions. The theory depends upon two propositions: (a) that there is jurisdiction to entertain such a § 1983 claim; and (b) that, on the merits, if the defendant public officials have the power to "make good

[2] *Griffin* v. *School Board,* 377 U.S. 218, 233 (1964).

the wrong done," § 1983 permits remedies which require those officials to exercise that power even where doing so impacts upon the treasury of the entity which they serve.[3] The court below found that plaintiffs' theory foundered on the first proposition—it held that as the public officials are not "persons," there is no jurisdiction to entertain the claim. The court did not reach or discuss the second proposition. We deal with both propositions herein.

[3] The theory is applicable only where the wrongdoing officials hold positions of responsibility empowering them to provide the relief sought. Not every act of misconduct by every municipal employee can lead to an order against him in his official capacity impacting upon the public treasury. The courts can do no more than order wrongdoing officials to exercise "the power that is theirs" to right the wrongs which they have committed through their offices. *Griffin* v. *School Board,* 377 U.S. 218, 233 (1964). See also *Swann* v. *Board of Education,* 402 U.S. 1, 30 (1971). Although a court may have jurisdiction over a public official, it cannot instill him with powers to undo his wrong which he does not possess by virtue of his office. The wrongdoing policemen in *Monroe* v. *Pape,* 365 U.S. 167 (1961), could not have been ordered to make their victims whole from the public treasury—their official powers did not extend that far. Nor could such relief have been directed at their superiors who *did* have such powers, for those superiors were not wrongdoers. As this Court explained in *Rizzo* v. *Goode,* 423 U.S. 362, 377 (1976), distinguishing *Swann* and *Brown*, relief may be obtained only against those responsible for the wrong:

> "Those against whom injunctive relief was directed in cases such as *Swann* and *Brown* were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution."

A. Public Officials in Their Official Capacities Are "Persons" Within the Meaning of § 1983, No Matter What Relief Is Sought Against Them, and the Federal Courts Have Jurisdiction Under 28 U.S.C. § 1343 To Entertain Claims for All Types of Relief Against Such "Persons."

The court below did not question that there would have been jurisdiction in the district court to hear and resolve plaintiffs' claims against the public officials had injunctive or declaratory relief been sought: "There is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of [42 U.S.C.] § 1983 when they are sued for injunctive or declaratory relief."[4] The court ruled, however, that these same defendants are not "persons" within the meaning of § 1983 when they are sued for monetary relief, and therefore that "[w]e are . . . without jurisdiction to hear this suit."[5]

The court below founded its analysis upon this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), which held, *inter alia*, that in a suit for money damages a municipality is not a person within the meaning of what is now codified as § 1983. The court below reasoned as follows: (a) the Department of Social Services and the school board here are in effect part of the City of New York and thus, under *Monroe*, not "persons" in their own rights; (b) the monetary relief sought against the public officials in their official capacities would in fact come out of the treasuries of the Board of Education and the City of New York; consequently (c) the real parties in interest are the City and the Board and not the named public officials; and (d) suits against public officials may not be used

[4] Pet. A. 53-54.

[5] Pet. A. 60.

as a "subterfuge" to sue non-"persons," and thus jurisdiction does not lie under § 1343(3).[6] (We assume, for purpose of our argument in Part I, that as the court below held, school boards are not "persons." Of course if they *are* "persons," as we show they are in Part II, there could be no inhibition upon suits against school boards *or* their officials for relief impacting upon their treasuries.)

Significantly, the court below completed the foregoing analysis without dealing with this Court's decision in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973) —a decision which cannot be reconciled with the holding below that public officials are "persons" for declaratory and injunctive relief but not for monetary relief. In *Kenosha*, this Court held that a municipality is not a "person" suable under § 1983 for *any* relief, declaratory or injunctive as well as monetary. Given the *Kenosha* holding, the logic of the court of appeals' analysis would apply equally to preclude jurisdiction of a claim for declaratory or injunctive relief against a public official in his official capacity, where the real impact of that relief would be felt by the entity which is not a "person." Just as with monetary relief, it could be said that to entertain a suit against the public official in his official capacity for such declaratory or injunctive relief would be sanctioning a "subterfuge" to accomplish indirectly what cannot be done directly.

[6] Pet. A. 55-61. Although recognizing that the Eleventh Amendment is inapplicable to this case, the court below thought that the case law developed under that Amendment furnished "a compelling analogy" for its ruling. *Id.* at 56. In fact, the analogy is wholly flawed. We defer our demonstration on this point to Part I-B, *infra*, for even if the analogy were valid it would go to the scope of the federal court's remedial power, not to its jurisdiction.

Kenosha found no evidence in the legislative history of § 1983 or in its language "to suggest that the generic word 'person' was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them." 412 U.S. at 513. The same is true as to public officials. The statute prescribes the same cause of action, in the same terms, against "every person." And there is not a word in the legislative history suggesting that public officials are "'persons" for some purposes but not others. Thus, there is no more basis here than in *Kenosha* for bifurcating the "person" status of the defendants. Regardless of the relief sought, there must be but a single answer to the question whether a public official in his official capacity is a "person" suable under § 1983.

That answer has already been provided by this Court in dozens of cases. For decades, this Court has entertained and decided § 1983 actions against public officials in their official capacities; indeed, all of the Court's school desegregation and legislative reapportionment decisions have been rendered in such actions.[7] In all of these cases the public entity was the "real

[7] The school desegregation cases are cited *infra* p. 28, n. 28. The legislative reapportionment cases include *Baker* v. *Carr*, 369 U.S. 186 (1962); *Reynolds* v. *Sims*, 377 U.S. 533, 537 (1964); *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, 635 (1964); *Davis* v. *Mann*, 377 U.S. 678, 680 (1964); *Roman* v. *Sincock*, 377 U.S. 695, 697 (1964).

Of course, in all the school desegregation cases, suit was brought not only against the public officials in their official capacities, but also against the school board itself. It is possible, therefore, that this Court entertained those cases because school boards are themselves "persons" under § 1983. In that event, those cases establish that there is no jurisdictional problem here, at least with respect to that portion of the case concerning school board employees, for here too suit was brought against the school board as well as against the public officials. See part II, *infra*.

party in interest," and in many the relief awarded impacted directly upon the entity's treasury.[8]

It is true that in none of these cases was the issue whether public officials in their official capacities are "persons" directly addressed. But a finding, implicit or explicit, that such defendants are "persons" suable under § 1983 was a necessary predicate to this Court's entertaining those cases and approving relief therein, particularly as this Court has recognized its duty—in the context of a case brought pursuant to § 1983 and § 1343(3)—*sua sponte* "to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded," *City of Kenosha* v. *Bruno*, *supra*, 412 U.S. at 511. It is not without significance that on the very day that *Kenosha* was decided, holding *sua sponte* that public entities may not be sued under § 1983, this Court affirmed an order in another § 1983 action directing a public *official* to reimburse excess tuition payments which had been improperly collected from students. *Vlandis* v. *Kline*, 412 U.S. 441, 444-445, 454 (1973).

Notwithstanding the absence of express consideration, these many decisions by this Court surely constitute *stare decisis* on the issue whether public employees in their official capacities are "persons" under § 1983. Too many important decisions of this Court have proceeded on that premise for the question to be considered other than settled. As this Court stated in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306-307 (1962):

> "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was

[8] We cite and describe these cases *infra*, pp. 15, 17.

> not questioned but was passed *sub silentio*, . . . neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years."

Adherence to the rule implicitly established by these § 1983 cases is particularly appropriate here, for the rule is one of statutory construction (rather than constitutional interpretation).[9] Congress has been free to change it, yet, despite close congressional scrutiny of the pertinent decisions, Congress has evinced no dissatisfaction with the rule.[10]

In sum, there is no room for a holding that public officials in their official capacities are not "persons" suable under § 1983, and the court below erred in ruling that there was no § 1343 jurisdiction over plaintiffs' claim against these defendants. There remains the "merits" question, which the court below did not reach, whether there are special limitations upon the relief which can be awarded against these defendants, and it is to that question that we now turn.

B. When Public Officials Use the Powers of Their Office To Violate Constitutional Rights, They May Be Ordered To Use the Powers of Their Office To Remedy Their Violations Even Though the Public Treasury Be Impacted.

It is a familiar principle of federal law that when a federal court has jurisdiction over a defendant who has violated constitutional rights, it will ordinarily

[9] *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting), quoted with approval in *Edelman* v. *Jordan*, 415 U.S. 651, 671 n.14 (1974).

[10] Cf. *Flood* v. *Kuhn*, 407 U.S. 258, 282-284 (1972). We discuss the congressional response to the Court's desegregation decisions *infra*, pp. 15-16, 30-32.

require him to do what he can to repair the damage. "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).[11] On its face, § 1983 is such a statute. It creates a cause of action for "redress" by the "party injured" against "*every person*" violating constitutional rights, and prescribes the broadest possible avenue to relief: through "an action at law, suit in equity, or other proper proceeding." See also 42 U.S.C. § 1988. These words do not seem to admit of the interpretation that Congress meant the "injured party" to go without "redress" when the injury is monetary and the wrongdoing "persons" are public officials. In the face of this unequivocal statutory language, it is difficult to see any basis for not applying the ordinary rule that federal courts "will make good the wrong done." Any advocate to the contrary should be required to bear a heavy burden of persuasion.

The court below did not address this question in these terms, for it mistakenly disposed of the case on jurisdictional grounds. But it is easy to see from its

[11] "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 239 (1969). "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury," *Wicker* v. *Hoppock*, 6 Wall. 94, 98 (1867), reaffirmed in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-19 (1975). Justice Cardozo put the principle in these words: "Once let it be ascertained that the amount is determinable and all that follows is an incident . . . . [O]nce a wrong is brought to light[, t]here can be no stopping after that until justice is done." *Bemis Bros. Bag Co.* v. *United States*, 289 U.S. 28, 35-36 (1933).

opinion how it would have answered it: the court below thought that "the Reconstruction Congress which enacted the Civil Rights Act sought to protect municipal treasuries," [12] and no doubt would have concluded that Congress intended to restrict the relief available against public officials commensurately with that object. Although the *logical* implementation of such an understanding of congressional intent would be to permit no award against public officials which impacts on municipal treasuries, the court below, which perceived a "compelling analogy" in the Eleventh Amendment cases,[13] presumably would have precluded only awards of retroactive monetary relief.

We will show herein that in § 1983 suits against public officials neither the complete prohibition of awards which impact upon municipal treasuries nor the preclusion only of awards of retroactive monetary relief from such treasuries is a defensible result. In doing so, we will proceed as follows: First, this Court has already decided in numerous cases that relief may be granted which impacts upon the public treasury in § 1983 suits against public officials in their official capacities, and Congress has accepted, indeed built upon, those decisions. Second, the Eleventh Amendment "analogy" to which the court below refers is the product of this Court's effort to reconcile competing constitutional interests; it makes no sense as a means to determine the intent of the 1871 Congress in enacting § 1983, and in fact leads to a distortion of the manifest congressional purpose.

1. A construction that § 1983 precludes all awards against public officials impacting upon public treas-

[12] Pet. A. 59.

[13] Pet. A. 56.

uries could not be reconciled with the many decisions of this Court in § 1983 actions against public officials requiring the expenditure of enormous sums from local governmental treasuries—decisions which Congress has followed closely, legislated about, but never chosen to overturn.

Many of this Court's school desegregation decisions, for example, have required large expenditures from local government treasuries. The leading example is *Griffin* v. *School Board*, 377 U.S. 218, 233 (1964), where the Court authorized issuance of an order requiring public officials "to exercise the power that is theirs to levy taxes to raise funds" if necessary to reopen the public schools. And, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30, and n.12 (1971), the Court affirmed a busing order requiring "local school authorities" "to employ 138 more buses than [the school system] had previously operated."

Congress, aware that the Court has issued orders against public officials requiring them to expend public funds, has not amended either 42 U.S.C. § 1983 or 28 U.S.C. § 1343(3) to withdraw the federal courts' authority and/or jurisdiction to issue such orders; on the contrary, Congress has expressly declared its intention *not* to do so.

In 1974, Congress found that "the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount[s] of funds, thereby depleting their financial resources . . ." 20 U.S.C. § 1702(a)(3). Congress' response was not to withdraw either jurisdiction or judicial power to require such plans, but simply to legislate revised eviden-

tiary standards and remedial priorities to be employed by the courts in deciding such cases.[14] And lest that step be misunderstood as a statutory withdrawal of judicial power or jurisdiction, Congress took care to declare expressly that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b).[15]

Either the 1871 Congress really did intend to "protect municipal treasuries," or it did not. If it did, and if there had been no intervening developments, the solution would be clear: the Court would be required to "give effect to the legislative will," *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975), by forbidding all remedies in § 1983 actions which impact monetarily upon public treasuries. But, of course, there have been intervening developments: this Court has repeatedly approved just such remedies—both "prospective," as we have just shown, and "retroactive," as we show below— and the modern Congress has responded by expressly affirming its desire *not* to "modify or diminish" the power of the federal courts

[14] 20 U.S.C. §§ 1703-05, 1712-18, 1752-58.

[15] In 1972, Congress had similarly found that "the process of eliminating or preventing minority group isolation . . . involves the expenditure of additional funds to which local educational agencies do not have access." 20 U.S.C. § 1601(a). Then, too, Congress' response was not to cut back on the federal courts' statutory powers or jurisdiction, but rather to reaffirm the propriety of their exercise. Congress decided "to provide financial assistance" to enable local educational agencies to meet the demands of these court orders, 20 U.S.C. §§ 1601(b)(1), 1605(a)(1)(A)(i), and enlarged upon the remedies available in such actions by expressly authorizing attorney's fee awards, 20 U.S.C. § 1617.

to award such remedies. Under these circumstances, this Court's prior decisions must be taken to preclude a holding that public treasuries can never be affected.

2. A construction of § 1983 which would permit orders requiring public officials to spend public funds prosepectively, while precluding orders against such officials directing retroactive monetary payments from the public treasury, would also collide with prior decisions of this Court. In *Vlandis* v. *Kline*, *supra*, 412 U.S. at 444-445, 454, a § 1983 case, this Court affirmed an order requiring a public official to reimburse excess tuition payments collected in violation of constitutional rights. Similarly, in *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632, 638 (1974), a § 1983 case, this Court affirmed as "appropriate relief" a backpay award to pregnant teachers unconstitutionally suspended from employment (see 326 F. Supp. 1159, 1161 (E.D. Va. 1971)). Cf. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (all opinions in this case either expressly declare or implicitly assume that, where the Eleventh Amendment is inapplicable, retroactive monetary relief from a public entity's treasury may be awarded in a § 1983 action against public officials in their official capacities).[16]

[16] *Edelman* was a § 1983 action brought against officials of the State of Illinois seeking, *inter alia*, an order requiring the defendants to provide benefits which would have been paid but for their unlawful delays.

The Court began its analysis with the recognition that the monetary award, although addressed to the public officials, would in fact be paid from the public treasury—in this instance, the *state* treasury. "These funds will obviously not be paid out of the pocket of petitioner Edelman . . . The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois." 415 U.S. at 664, 665. The Court then ruled, by a 5-4 vote, that such an award was precluded by the Eleventh Amendment.

For present purposes, the important part of *Edelman* is not

But, even passing these prior decisions, nothing can be found on the face of § 1983 or in its legislative history to justify distinguishing between prospective and retroactive relief. Such justification as can be made for such a distinction must come not from anything internal to § 1983 or its background but from the "compelling analogy" of this Court's Eleventh

its construction of the Eleventh Amendment—as we show below, the Eleventh Amendment is inapplicable here because it protects only state treasuries, not local school board treasuries—but the apparent unanimity on the Court that *but for* the Eleventh Amendment the monetary relief would have been recoverable under § 1983 despite the fact that it came from the treasury of a public entity (the State) not itself a "person" under § 1983.

Initially, it is apparent that, if § 1983 did not authorize monetary awards against public officials payable from public funds, there would have been no occasion for the Court to discuss the Eleventh Amendment at all in *Edelman*. Pursuant to the policy of avoiding unnecessary constitutional adjudication (*see, e.g., Hagans* v. *Lavine*, 415 U.S. 528, 546-547 (1974)), the Court need only have declared that § 1983 itself did not authorize the award, and the case would have been over. Only if the Court was of the view that § 1983 otherwise *would* reach the public treasury was it appropriate to reach the constitutional question whether the Eleventh Amendment dictated a contrary result.

All four dissenters in *Edelman* (including the author of *Monroe* v. *Pape*) would have allowed the recovery against state officials even though it was to be paid from state funds. 415 U.S. at 678-687 (Douglas, J., dissenting); *id.* at 687-688 (Brennan, J., dissenting); *id.* at 688-696 (Marshall, J., joined by Blackmun, J., dissenting). The majority, of course, disagreed, but not because of any limitation found in § 1983 itself. Rather, the majority concluded that the Eleventh Amendment constituted an independent restriction upon the scope of relief available in federal court. 415 U.S. at 677:

> "Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, *consistent with the Eleventh Amendment*, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . ." (emphasis added; footnotes omitted).

Amendment decisions.[17] As we show, this "analogy" cannot bear examination.

The distinction between retroactive and prospective relief for purposes of the Eleventh Amendment does not purport to be an expression of the will of the framers of that Amendment. Rather, it represents the culmination of this Court's effort—begun with the creation of the fiction of *Ex parte Young*, 209 U.S. 123 (1908)—to reconcile the clash of values established by two constitutional amendments, adopted more than 60 years apart: on the one hand, the "sword" of the Fourteenth Amendment;[18] on the other, the "shield" of the Eleventh.[19] The Eleventh Amendment was designed to insulate state treasuries against federal court awards;[20] the Fourteenth Amendment was designed to place limitations upon states in their treatment of private persons.[21]

The line ultimately drawn in *Edelman* v. *Jordan*, *supra*, evolved from a series of decisions confronting different aspects of the apparent tension between the two amendments. This end product—the line between prospective and retroactive monetary relief—is one which "will not in many instances be that between

[17] As the court below recognized, the Eleventh Amendment has no direct application to this case, because neither cities nor local school boards enjoy Eleventh Amendment protection. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 667, n. 12; *Mt. Healthy School Dist.* v. *Doyle*, 45 LW 4079, 4081 (1977).

[18] *Edelman* v. *Jordan*, *supra*, 415 U.S. at 664.

[19] *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 448 (1976).

[20] *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 n. 1 (1959); *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 187 (1963).

[21] *Fitzpatrick*, *supra*, 427 U.S. at 456.

day and night." *Edelman*, 415 U.S. at 667. This Court did not attempt in *Edelman* to explain the result as a logical distinction which Congress would have drawn starting from first principles, but as the evolved harmonization of conflicting constitutional interests.

To import the line drawn in such fashion into the meaning of § 1983 would make no sense. We are concerned here with the interpretation of a single enactment of Congress. "Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will." *Philbrook* v. *Glodgett*, *supra*, 421 U.S. at 713. While it is theoretically possible that a Congress might choose to draw the line between prospective and retroactive monetary awards impacting upon a municipal treasury, there is not a shred of evidence in the legislative debates to suggest that the Congress of 1871 *in fact* intended to draw such a line in § 1983. Nor is there anything so inherently "right" about the line to attribute it to Congress without any foundation in the language or history of the Act. Is it likely, for example, that Congress intended to empower the federal courts to require massive expenditures from public treasuries to achieve desegregation, while at the same time intending to withhold power from those courts to award back salaries from the same treasuries to the black teachers discriminatorily selected for dismissal and non-renewal as desegregation plans were implemented?[22] It would be a

[22] Cases are common in which the lower federal courts have upheld the propriety in § 1983 cases of backpay awards to black teachers who were discriminatorily selected for dismissal or non-renewal when school integration necessitated force reductions. See, e.g., *Smith* v. *Board of Education of Morrilton School District*, 365

most remarkable coincidence if Congress in 1871 had drawn the precise line which did not begin to be drawn in the Eleventh Amendment cases until 1908 and did not reach final shape until 1974 following decades of litigation.[23]

More important, the importation of the Eleventh Amendment line into § 1983 would contravene the central purpose of that statute—to provide a complete federal remedy for federal constitutional wrongs committed under color of state law—without serving any other purpose which the Congress that enacted § 1983 meant to achieve. The language of § 1983 and its legislative history make clear that the competition of values which led to the distinction between prospective and retroactive relief for purposes of the Eleventh Amendment has no analogous counterpart in § 1983. The latter provision was intended to be broadly remedial and its enactors did not seek to "protect municipal treas-

F.2d 770, 783-784 (8th Cir. 1966) (Blackmun, J.); *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 193 (4th Cir. 1966) (*en banc*); *Hill* v. *Franklin County Board of Education*, 390 F.2d 583 (6th Cir. 1968); *Rolfe* v. *County Board of Education of Lincoln County*, 391 F.2d 77, 81 (6th Cir. 1968); *Hatton* v. *County Board of Education of Maury County*, 422 F.2d 457 (6th Cir. 1970); *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319, 323 (5th Cir. 1970) (Bell, J.) (*Compare*: *Muzquiz* v. *City of San Antonio*, 528 F.2d 499 (5th Cir. 1976) (*en banc*)); *McFerren* v. *County Board of Education of Fayette County*, 455 F.2d 199 (6th Cir.), *cert. denied*, 407 U.S. 934 (1972). See also, *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966) (*en banc*); *Johnson* v. *Branch*, 364 F.2d 1977 (4th Cir. 1966) (*en banc*), *cert. denied*, 385 U.S. 1003 (1967); *North Carolina Teachers Ass'n* v. *Asheboro City Board of Education*, 393 F.2d 736 (4th Cir. 1968) (*en banc*).

[23] The Eleventh Amendment line began to be drawn in *Ex parte Young*, 209 U.S. 123 (1908), and reached its present contours only with the decision of *Edelman* in 1974.

uries." Congress established a sword in § 1983, but no shield.

Analysis of what Congress meant must begin with what was enacted. In its terms, as described above, § 1983 provides to the "party injured" a cause of action for "redress" "in an action at law, suit in equity, or other proper proceeding" against "[e]very person" who violates its substantive provisions. This Court, in the context of interpreting another portion of the Civil Rights Act of 1871, stated that the approach to Reconstruction civil rights statutes is to " 'accord [them] a sweep as broad as [their] language.' " *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971), quoting from *United States* v. *Price*, 383 U.S. 787, 801 (1966). On its face, § 1983—and it is here the meaning of that provision alone which is at issue—provides for complete "redress" against "every person" who violates its terms. That language in itself, cannot constitute the basis for finding a prohibition of retroactive monetary relief against *any* "person."

The legislative history of § 1983 confirms a remedial purpose as broad as its language. We analyze that history in great detail in the appendix which follows this argument. That analysis shows that Congress in passing what is now § 1983 meant to establish a private cause of action for redress as broad as it was empowered to create by the Fourteenth Amendment. Not a word said in connection with the enactment of § 1983 indicates the slightest intention to leave a party injured by a Fourteenth Amendment violation with less than a full remedy. Indeed, the contrary is true: complete remedy for such constitutional violations was Congress' preoccupation. See pp. 5a-13a, *infra*. In this connection, nothing in the debates over § 1983 indicates any

congressional concern to "protect municipal treasuries." If anything, the evidence is strong that Congress meant municipalities to be subject to suit under § 1983 directly as "persons." Congress understood that the Fourteenth Amendment applied to restrict the actions of municipalities, and § 1983 was intended to create a private cause of action as broad as the scope of that Amendment (see pp. 15a-16a, *infra*); and, a month before the introduction of the bill containing § 1983, and less than two months before its passage, Congress had enacted a definitional statute to assist in the construction of subsequently enacted statutes, which provided that except where there was evidence of a contrary congressional intent the term "persons" should be understood to include "bodies politic and corporate." See pp. 1a, 14a-15a, *infra*.

Each of the propositions just set forth regarding the legislative history is fully supported in the appendix. That history, taken together with the unequivocal language of the statute, is sufficient to dispose of any effort to read into § 1983 a distinction between prospective and retroactive remedies in actions against public officials in their official capacities.

It would be sufficient to stop here, but for a complication which results from certain statements made about the legislative debates of 1871 in *Monroe* v. *Pape*, *supra*. *Monroe* decided that the enacting Congress did not mean to include municipalities within the term "persons" in § 1983. That conclusion was based not on the legislative history of those portions of the bill which Congress enacted into law—indeed, as we show in the appendix, *that* legislative history clearly indicates the opposite—but on the history of an amendment to that bill, the Sherman Amendment, which was eventually defeated. 365 U.S. at 187-192. The Sherman

Amendment proposed to make counties, cities, and parishes liable in damages for *private* acts of violence occurring within their boundaries, without regard even to whether those entities had been delegated any police power by the state with which to deal with such violence. See pp. 17a-19a, *infra*. The *Monroe* Court understood the defeat of that amendment to have resulted from Congress' doubt as to its constitutional power to "impose civil liability on municipalities," 363 U.S. at 190. In fact, this understanding is incorrect, as is apparent from two considerations:

First, Congress did not doubt its power to "impose civil liability on municipalities" *in the circumstances governed by § 1983*, i.e. where a municipality in the exercise of powers delegated to it by the state violates the prohibitions of Section 1 of the Fourteenth Amendment. Congress had voted for the Fourteenth Amendment in 1866, and as this Court has repeatedly recognized, it meant the prohibitions of Section 1 to apply to local governmental bodies. *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913); *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938). We demonstrate Congress' awareness of this power in the appendix. See pp. 15a-16a, *infra*. We note here only that the 1871 Congress could not have forgotten what it had done five years earlier, for Representative Bingham (whom Justice Black called "the Madison of the First section of the Fourteenth Amendment"[24]) reminded his colleagues during the debate on § 1983 that in drafting the first section of the Fourteenth Amendment he had used the words "No State shall . . ." for the precise purpose of overruling a Supreme Court decision hold-

[24] *Adamson* v. *California*, 332 U.S. 46, 74 (1947) (dissenting opinion).

ing that a *city's* taking of personal property without compensation did not violate the Constitution as it then stood.[25] He went on to explain that he had copied these words from the Impairment of Obligations of Contracts Clause.[26] And in 1867, only four years prior to the debate on § 1983, the Supreme Court had ruled that the latter clause bound municipalities equally with states, and affirmed a writ of mandamus compelling municipal officers to levy taxes if necessary to honor the contract sought to be impaired. *Von Hoffman* v. *City of Quincy*, 71 U.S. 535, 554-555 (1867).

Second, an examination of the debates over the Sherman Amendment reveals that while the Amendment failed owing to a doubt concerning Congress' power, it was a doubt germane to the Sherman Amendment's unique provisions and wholly irrelevant to the meaning of § 1983. See pp. 17a-31a, *infra*. The Sherman Amendment had nothing to do with requiring municipalities to abide by the requirements of the Fourteenth Amendment in exercising powers delegated by the states; rather, it would have made municipalities affirmatively responsible for preventing certain *private* acts of violence from occurring within their boundaries. Congress' doubt went only to its constitutional power to impose on local government bodies the affirmative obligation to exercise the police power; it was this doubt which led to the defeat of the Sherman Amendment. The Republican representatives who supported the bill generally, but whose defection caused the defeat of the Sherman Amendment, asserted that

[25] Cong. Globe, 42 Cong., 1st Session, Appendix (hereinafter "Globe App."), p. 83-84.

[26] Globe App. 84.

it was the prerogative of the states to determine whether and how to delegate the police power function to local governments; that Congress could not bypass the states and impose such functions directly upon those governments; and consequently that Congress lacked power to hold municipalities monetarily liable for failing to exercise such power. See pp. 21a-31a, *infra*. That constitutional doubt, of course, warrants no inference that Congress intended to insulate municipal treasuries in § 1983, for, unlike the Sherman Amendment, § 1983 did not purport to impose any affirmative obligations upon municipalities, but only to enforce the prohibitions of the Fourteenth Amendment—"no State shall . . ."—which Congress knew applied to municipalities in their exercise of whatever powers the states chose to delegate to them. We analyze the meaning of the defeat of the Sherman Amendment more fully in the appendix.

We do not challenge here the holding of *Monroe* v. *Pape*. Soundly based or not, the decision there that municipalities are not "persons" under § 1983, twice relied upon in recent decisions,[27] may well be entitled to *stare decisis* effect. But neither *stare decisis* nor any other doctrine compels this Court to perpetuate *Monroe's* erroneous reading of the legislative history when, as here, distinct issues of statutory construction, not controlled by the actual holding of *Monroe*, are presented for decision. Congress did *not* intend to "protect municipal treasuries," and there is thus no warrant for limiting the remedies available in a § 1983 action against public officials in their official capacities.

[27] *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). See also *Aldinger* v. *Howard*, 427 U.S. 1, 16 (1976).

II. SCHOOL BOARDS ARE "PERSONS" WITHIN THE MEANING OF § 1983.

The court below decided that the Board of Education of the City of New York is not a "person" within the meaning of § 1983. The opinion is ambiguous as to the ground upon which this decision is based. On the one hand, the opinion indicates that due to institutional characteristics peculiar to this board of education, it should be considered a part of the City of New York, and not an independent entity; therefore, the board is not a "person" because the city is not a "person." Pet. A. 44-50. If this be the court's holding, it is not of particular interest to these *amici*, whose concern is with the "person" status of those school boards which are independent entities. We do note on this issue, however, that contrary to the apparent conclusion of the court below, the New York courts have consistently ruled that the New York City Board of Education is "an independent corporation separate and distinct from the city." *Lanza* v. *Wagner*, 11 N.Y.2d 317, 326 (1962); *People ex rel. Wells & Newton Co.* v. *Craig*, 232 N.Y. 125, 135 (1922).

On the other hand, implicit in a portion of the court's analysis is a finding that no school boards, regardless how constituted, are "persons" within the meaning of § 1983. If this be the court's holding, we believe it to be in error. In their typical form, local school boards are distinct and independent governmental entities not properly viewed as mere sub-parts of other governmental bodies. See *Milliken* v. *Bradley*, 418 U.S. 717, 741-743 (1974). As consistently as this Court has treated other governmental entities as outside the ambit of § 1983 and § 1343(3), so equally consistently (and in far greater volume) has this

Court treated school boards as *within* the ambit of those provisions. In case after case, particularly in the school desegregation area, this Court has entertained § 1983 actions in which school boards were defendants, without any indication that such boards were not proper parties.[28]

Beyond merely entertaining these cases, the Court has on a number of occasions issued orders against school boards or directed or approved the issuance of such orders. For example, in *Green, supra*, 391 U.S. at 437-439, 441-442, a unanimous Court declared:

> "13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of Respondent School Board's 'freedom of choice' plan to achieve that end. The School Board contends that it has fully discharged its

[28] See, e.g., *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *McNeese* v. *Board of Education*, 373 U.S. 663 (1963); *Abington School Dist.* v. *Schempp*, 374 U.S. 203 (1963); *Griffin* v. *School Board*, 377 U.S. 218 (1963); *Bradley* v. *School Board*, 382 U.S. 103 (1965); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Raney* v. *Board of Education*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *Kramer* v. *Union School District*, 395 U.S. 621 (1969); *Alexander* v. *Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana School Bd.*, 396 U.S. 226 (1969), 396 U.S. 290 (1970); *Swann* v. *Board of Education*, 402 U.S. 1 (1971); *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33 (1971); *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973); *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974); *Goss* v. *Lopez*, 419 U.S. 565, 568 (1975); *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976); *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 424 (1976). Several of these decisions encompassed two or more consolidated cases. In addition to these full decisions, there of course has been an enormous number of *per curiam* decisions in school desegregation cases against school boards.

> obligation . . . But that argument ignores the thrust of *Brown II* . . . School boards such as the respondent . . . were . . . charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system . . . [I]t was to this end that *Brown II* commanded school boards to bend their efforts.
>
> ". . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.
>
> * * *
>
> "The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system . . . [T]he plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." (emphasis in original; footnote omitted).

To like effect, see, e.g., *Carter, supra*, 396 U.S. at 228; *Keyes, supra*, 413 U.S. at 213-214; *Monroe, supra*, 391 U.S. at 458-459; *Alexander, supra*, 396 U.S. at 20; *Davis, supra*, 402 U.S. at 35. See also *Bradley, supra*, 416 U.S. at 699, 718.

Congress has followed these decisions closely and has assumed from these decisions, and acted upon the assumption, that school boards are subject to suit by

private parties. In 1964, 1972, and 1974, Congress enacted into law statutes founded on that assumption.

In 1964, Congress augmented what it took to be an existing right of private parties to bring discrimination actions against school boards by providing that, under certain circumstances, the Attorney General may bring such actions where he can certify that the aggrieved private parties are as a practical matter unable to bring their own suit. 42 U.S.C. § 2000c-6. Congress was careful to make clear that it did not intend to "affect adversely the right of any person to sue or obtain relief in any court against discrimination in public education." 42 U.S.C. § 2000c-8.

In 1972, Congress passed extensive legislation in response to the school desegregation decisions of this Court and the lower federal courts, again building on the assumption that school boards are proper defendants in private actions to enforce constitutional rights. The 1972 Congress passed, *inter alia:* (a) a provision allowing attorney's fees to the prevailing party, "other than the United States," "[u]pon entry of a final order by a court of the United States against a local educational agency, . . . " for violation of the Fourteenth Amendment, 20 U.S.C. § 1617; and (b) a provision authorizing federal financial assistance to "local school agenc[ies]" which are implementing a desegregation plan "undertaken pursuant to a final order issued by a court of the United States, . . . ," 20 U.S.C. § 1605 (see also 20 U.S.C. § 1601). Once again, Congress recognized the "existing power" of federal courts "to insure compliance with constitutional standards" in school desegregation actions, 20 U.S.C. § 1656, and sought only to prohibit "enlargement" of that power, *id.*

In 1974, Congress found, *inter alia,* that as a result of court busing orders in suits brought to enforce the Fifth and Fourteenth Amendments, "local educational agencies" had been required to "expend large amounts of funds, thereby depleting their financial resources. . . ." 20 U.S.C. § 1702(a)(3). That finding did not motivate Congress to withdraw federal jurisdiction over suits against "local educational agencies." Rather, Congress in 1974 sought to set remedial priorities in such suits, so that busing would be a remedy of last resort. See particularly, 20 U.S.C. § 1713. Far from removing jurisdiction, Congress made clear that "the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." 20 U.S.C. § 1702(b).

From time to time bills have been introduced in Congress designed to withdraw or limit federal court jurisdiction to entertain suits against school boards.[29] No such bill has been enacted. Other bills have been introduced which proposed to limit the remedies available in school desegregation suits, drafted in a fashion

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[29] In the first session of the 93rd Cong., for example, the following bills were introduced in the Senate: S. 179 (Jan. 4, 1973), a bill introduced by Senator Griffin to deprive federal courts of jurisdiction to issue busing orders; S. 287 (Jan. 11, 1973), a bill introduced by Senator Scott to withdraw all lower federal court jurisdiction over cases "involving the public schools"; S. 1737 (May 8, 1973), a bill introduced by Senators Ervin and Allen which, in Sec. 1207, would withdraw federal court jurisdiction, *inter alia,* to "issue any order requiring any school board" to abandon a freedom-of-choice plan, or "requiring any school board" to bus, or "requiring any school board" to close any school.

which clearly reflects the sponsors' belief that school boards are presently proper defendants in such suits.[30]

For over twenty years, and in more than that many cases, this Court has treated school boards as "persons" subject to suit pursuant to § 1983 and § 1343(3). Congress has understood this Court so to have ruled, and has after careful consideration accepted, indeed built upon, that understanding. In the light of this history, the question whether school boards are "persons" under § 1983 must be regarded as settled in the affirmative. See *Brown Shoe Co.* v. *United States, supra,* 370 U.S., at 306-307; *Flood* v. *Kuhn, supra,* 407 U.S., at 282-284.

[30] See, e.g., S. 619, 93d Cong., 1st Sess. (Jan. 31, 1973), a bill sponsored by Senators Allen, Baker, Buckley, Helms, Nunn, Scott, Sparkman, Stennis, Talmadge, and Thurmond, which provided in Sec. 207:

> "Sec. 207. Any court order requiring the desegregation of a school system shall be terminated, if the court finds the schools of *the defendant educational agency* are a unitary school system, one within which no person is to be effectively excluded from any school because of race, color, or national origin, and this shall be so, whether or not such school system was in the past segregated de jure or de facto. *No additional order shall be entered against such agency* for such purpose unless the schools of such agency are no longer a unitary school system." (emphasis added).

CONCLUSION

For the reasons set forth hereinabove, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX *

An Analysis of the Legislative History of the Civil Rights Act of 1871 as It Relates to the Issues Presented in This Case

I.

We begin by briefly describing the course of the legislation which emerged as the Civil Rights Act of 1871, noting the particular features which bear directly upon the issues in this case. We then discuss the pertinent legislative history in depth.

The legislative history properly begins on February 25, 1871, one month before the civil rights bill was introduced. On that day, the "dictionary act" was enacted, providing, in pertinent part:

> "That in *all* Acts hereafter passed . . . *the word 'person' may extend and be applied to bodies politic and corporate*, and the reference to any officer shall include any person authorized by law to perform the duties of such office, *unless the context shows that such words were intended to be used in a more limited sense* . . . ."[1]

On March 28, 1871, the House Select Committee reported H.R. 320, a bill "to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes," which, with such modifications as were made in the ensuing debates, emerged as the Civil Rights Act of 1871.[2]

The bill contained four sections. Section 1—now codified in 42 U.S.C. § 1983—was enacted by Congress in

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* Throughout this Appendix, "Globe" is used to refer to the Congressional Globe, 42d Cong., 1st Sess., and "Globe App." is used to refer to the Appendix thereto.

[1] Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (emphasis added).

[2] Globe 317.

the form originally reported, without a single word change. It provided:

> "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the 9th of April, 1866, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and the other remedial laws of the United States which are in their nature applicable in such cases."[3]

Section 2 of the bill, as introduced, defined certain federal crimes and prescribed their punishment. Sections 3 and 4 proposed to empower the President to send the militia into the states and communities, and to suspend the writ of *habeas corpus*, in prescribed circumstances.[4]

The bill was debated first in the House. There were no amendments to Section 1. The sponsors uniformly declared that their purpose in enacting Section 1 was to provide as complete a civil cause of action for relief as the Fourteenth Amendment authorized Congress to create.[5] No "Sherman

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[3] Globe App. 138. See also 17 Stat. 13.

[4] Globe App. 138.

[5] See *infra*, pp. 5a-13a.

Amendment," or its equivalent, was proposed in the House. Sections 2, 3 and 4 were amended on the floor of the House to assuage the concerns of several Republicans that the bill as originally drafted might invade the States' reserved police powers.[6] The House bill, when passed, was referred to the Senate.

The Senate adopted Section 1 without change, its sponsors declaring the same broad purpose as had their House colleagues.[7] Just prior to the vote on the bill, Senator Sherman introduced his amendment on the floor of the Senate, the text of which appears *infra*, n.47, to make "the inhabitants" of the county, city or parish liable for injuries caused by private acts of violence within the municipality's borders. Pursuant to a rule of procedure which had been adopted, there was no debate on Sherman's amendment. The amendment was adopted by the Senate, and the entire bill, including the Sherman Amendment, was returned to the House.

The House refused to accede to the amendments which the Senate had made in the bill. The debate was brief. The Sherman Amendment was declared to be "obnoxious," and deserving of a quick burial, and with that the House voted to go to conference with the Senate.[8]

The conferees agreed upon a revised version of the Sherman Amendment, making the municipality, rather than its inhabitants, liable fo. private acts of violence within its borders, and reported back to their respective houses.[9]

The Senate took up the conference committee report first. This time, there was no rule precluding debate, and

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[6] See *infra*, pp. 21a-23a.

[7] See *infra*, pp. 7a, 11a-14a.

[8] See *infra*, p. 18a.

[9] See *infra*, pp. 18a-19a.

the substance of the Sherman Amendment was debated on the floor of the Senate. Its sponsors explained that their purpose was to impose upon municipalities the duty to police their communities, and to make them liable monetarily where they refused or failed to do so.[10] The Senate voted to adopt the conference report (and thus to adopt the revised Sherman Amendment) by a vote of 32 to 16. The vote on the conference report, like the original vote, was along party lines, the Republicans supporting the bill and the Democrats opposing it.[11]

The conference report fared less well in the House. The difference was that a number of Republicans defected from the "party line" on the Sherman Amendment. They doubted that Congress had the constitutional power to impose policing obligations upon municipalities; they believed that the States' reserved powers included the right to determine whether and to what extent to delegate police powers to municipalities; and they thought it improper for Congress to impose monetary liability for a municipality's failure to carry out a duty which Congress had no right to impose upon it. The Republicans opposing the Sherman Amendment were the very ones who had earlier raised similar "police power" objections to Sections 2, 3 and 4 as originally drafted. Within minutes after they spoke, the House voted to reject the conference report. Twenty-three House members who supported the rest of the civil rights bill voted against the Sherman Amendment, and their votes were decisive in causing its rejection.[12]

As a result of the House's rejection of the conference report, a second conference was necessary. In this conference, the Sherman Amendment was abandoned, and in

[10] See *infra*, pp. 19a-20a.

[11] See *infra*, p. 20a.

[12] See *infra*, pp. 29a-30a.

its place the provision now codified as 42 U.S.C. § 1986 was adopted. This second conference report was approved after brief debate by both Houses, and the bill as thus enacted was signed by President Grant.

As we show herein:

1. The legislative history of Section 1 shows that Congress intended by that section to exercise all of the power which it possessed under the Fourteenth Amendment to create civil actions for complete relief, and it did not intend to insulate municipal treasuries from liability in suits brought pursuant to Section 1; and

2. The Sherman Amendment was defeated for reasons which are wholly irrelevant to and furnish no evidence of Congress' intentions with respect to Section 1.

Accordingly, the legslative history refutes the contention that Congress intended to insulate municipal treasuries from liability in Section 1 suits.[13]

II.

Debate on the civil rights bill in the House was opened by Representative Shellabarger, Chairman of the House Select Committee, who had authored the bill[14] and was its manager in the House. He stated:

> "This Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the

[13] See *infra*, pp. 31a-32a.

[14] Representative Kerr, an opponent, was surprised that Shellabarger "could at all conceive and pen such provisions as are contained in this measure." Globe App. 46.

> United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. These provisions of the Fourteenth Amendment are wholly devoted to securing the equality and safety of all the people, as is this Section [Section 1], and, indeed, the entire bill." [15]

Shellabarger went on to quote from Story on Constitution as follows:

> "Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws." [16]

Anticipating objections that the bill invaded state sovereignty, Shellabarger declared:

> "[W]here is the doubt Congress may, by appropriate legislation, protect those rights of American citizenship so solicitously and so abundantly guarded and made eternal as the Constitution itself? If, after all this transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States still remained unrestrained, . . . to make laws, abridging or not abridging, to protect or to destroy, by banded murder, these United States citizens as the State may please, and the United States must stand by a powerless spectator of the overthrow of the rights and liberties of its own citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of

[15] Globe App. 68. See also Globe 317.

[16] Globe App. 68.

> words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be." [17]

Shellabarger then "repeated" his premise, "that it is the duty of Congress to enforce by appropriate legislation every provision of the Constitution where legislation is needed to secure the enforcement." [18]

In the Senate, Senator Edmunds, the manager of the bill, declared:

> "The first section is one . . . defining the rights secured by the Constitution of the United States when they are assailed by any state law or under color of any state law, and it is merely carrying out the principles of the civil rights bill [of 1866, 42 U.S.C. §§ 1981, 1982], which have since become a part of the Constitution." [19]

Senator Edmunds added that Section 1 was "so very simple, and really reenacting the Constitution." [20]

In both houses, the statements of other supporters corroborated the views of the bill's managers: that Section 1 was an exercise of the entirety of Congress' power to create a civil cause of action for complete relief for violations of the rights established by the Fourteenth Amendment.

Representative Bingham, who had authored Section 1 of the Fourteenth Amendment, which was the constitutional predicate for Section 1 of the bill, declared the bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic in every

[17] Globe App. 69.

[18] Globe App. 70.

[19] Globe 568.

[20] Globe 569.

State and Territory of the Union *to the extent of the rights guaranteed to him by the Constitution.*" [21]

Representative Garfield, declaring that the Equal Protection Clause of the Fourteenth Amendment "is a broad and comprehensive limitation on the power of the State governments, and, without doubt, Congress is empowered to enforce this limitation by any appropriate legislation," [22] stated:

> "But the chief complaint is . . . [that] by a systematic maladministration of [state laws], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section [of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." [23]

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[21] Globe App. 81 (emphasis added). See also *id.* at 84. Representative Bingham elaborated further (*id.* at 85):

> "The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?"

[22] Globe App. 153.

[23] *Id.*

Representative Sheldon, urging that "it is the highest duty of the government to provide means to protect and secure every citizen in undisturbed enjoyment" of his constitutional rights, concluded:

> "It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its powers, through its courts, in times of peace, directly to the individual citizen who is deprived of his rights, privileges, and immunities, whether through the positive act or the default of the State authorities." [24]

He saw it is as "proper, to make a permanent law affording to every citizen a remedy in the United States courts for injuries to him in those rights declared and guaranteed by the Constitution." [25]

Representative Dawes explained that the bill goes as far as the Constitution goes, for its purpose was to provide a remedy whenever constitutional rights were violated:

> "The rights, privileges, and immunities of the American citizen secured to him under the Constitution of the United States are the subject matter of this bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities. No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto af-

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[24] Globe 367-368.

[25] Globe 368.

fecting the life, liberty and pursuit of happiness of every citizen of this Republic."[26]

Representative Dawes asked, "can there be any doubt that there exists whatever power is necessary to secure these rights?"[27] He answered that the Constitution carries with it:

> "the power by legislation, or by any other proper means, of securing and carrying out to their full extent the free, undisturbed enjoyment of each and every one of the rights, privileges and immunities whatever they may be and however broad they may be, which the Constitution itself secures, or professes at least to secure, to the American citizen."[28]

Representative Dawes concluded by asserting that:

> "Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and . . . this may be done—
>
> *First*. By giving him a civil remedy in the United States courts for any damage sustained in that regard."[29]

Other members of the House similarly evidenced their understanding that the bill was to exercise the full congressional power vested in Congress by the Fourteenth Amendment to provide a remedy assuring the full enforcement of that amendment's prohibitions. See, e.g., Globe App. 166 (Rep. Williams); Globe App. 182 (Rep. Mercur); Globe 428, 429 (Rep. Beatty); Globe 448 (Rep. Butler);

[26] Globe 475.

[27] *Id.* at 476.

[28] *Id.*

[29] *Id.* at 477.

Globe 481, 482, 483 (Rep. Wilson); Globe 511-512 (Rep. Perce); Globe App. 202 (Rep. Snyder); Globe 376 (Rep. Lowe); Globe App. 188 (Rep. Willard).

The Senate debates were similar. Senator Trumbull declared that the Fourteenth Amendment empowers the federal government both to "correct" violations of its provisions, and to "prevent any state from depriving any person" of the rights created thereunder.[30] In a dialogue, Senator Edmunds asked Senator Trumbull if he agreed that the Fourteenth Amendment made "a wise advance in favor of the protection of private rights by affirmative legislation by Congress where those private rights are guarantied by the Constitution, and that in connection with it Congress is authorized by the same Constitution to carry them into effect by affirmative law."[31] Senator Trumbull agreed, and noted that "we provide in the bill before us for a redress through the judiciary."[32] Senator Trumbull further stated that:

> "[I]n regard to all the rights secured by the Fourteenth Amendment, however extended, in time of peace, the courts are established to vindicate them, and they can be vindicated in no other way. Sir, the judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free Government."[33]

He added:

> "Whenever the rights that are conferred by the Constitution of the United States on the Federal Government are infringed upon by the States, we should afford a remedy. . . . I am ready to pass appropriate

[30] Globe 577.

[31] *Id.* at 578.

[32] *Id.*

[33] *Id.*

> legislation on that subject; and I understand that this bill as it passed the House of Representatives was framed on this principle."[34]

Senator Pool, noting that under the Fourteenth Amendment "the State is prohibited from denying in any manner . . . within its jurisdiction the equal protection of the laws," declared that should states violate that prohibition "then the United States . . . must and will, by appropriate legislation, by all the power of its courts . . . extend over him within the States the shield of the national authority."[35]

Senator Thurman was the leader of the opposition in the Senate, and he presented the most extensive criticism of § 1 contained in the entire debates. He launched his attack with these words:

> "This section relates wholly to civil suits. It creates no new cause of action. Its whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, an[d] that without any limit whatsoever as to the amount in controversy . . . . I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated; but I do think that it is a most impolitic provision, that in effect may transfer the hearing of all such cases into the Federal courts."[36]

[34] Globe 578-579.

[35] Globe 609.

[36] Globe App. 216.

And he concluded with this complaint:

> "[T]here is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used."[37]

Senator Boreman, a supporter, defined the congressional purpose to be to avoid "the merest mockery" of "say[ing] that the citizens of any portion of this country, or the people residing in any portion of this country, had guarantied to them by our Constitution certain rights, and at the same time to say that there was no power in this Government to secure to them those rights, to carry out the guarantee, to enable them to enforce those rights."[38] The goal, in Senator Boreman's view, was "to provide the machinery in order that the injured person may secure his rights."[39] It was Congress' duty, he said, "to protect the humblest citizen, the humblest person that will be found in any part of this Union, in all his rights, privileges, and immunities, whatever they may be under the Constitution . . . ."[40]

Other Senate supporters expressed similar views. See, e.g., Globe 650 (Sen. Sumner); Globe 653 (Sen. Osborn). Throughout the debates, therefore, complete justice was the central, recurring refrain: wherever and however Fourteenth Amendment rights are impaired, the injured party ought to—must—receive full redress. That was the plain intent underlying Section 1, as well as the other sections.

III.

With these declarations of purpose, both houses passed bills containing Section 1 in the exact language which was

[37] Globe App. 217.

[38] Globe App. 229.

[39] *Id.*

[40] *Id.*

finally adopted. Although the legislative history does not end at this point, for the Senate had amended other sections of the House bill (including the addition, without debate, of the Sherman Amendment as Section 7), there was not any further debate on Section 1. It is appropriate, therefore, to pause and examine what the two houses appear to have intended—at least at this point—respecting the application of Section 1 to municipalities. There are two pertinent guides to determining that intent:

1. On February 25, 1871, less than a month prior to the introduction of Section 1 in the exact language ultimately enacted, Congress adopted a statute (colloquially known as the "dictionary act"),[41] whose declared purpose was "to prevent doubt and embarrassment in [the] construction" of statutes.[42] Section 2 of that Act provided:

> "That in *all* Acts hereafter passed . . . *the word 'person' may extend and be applied to bodies politic and corporate*, and the reference to any officer shall include any person authorized by law to perform the duties of such office, *unless the context shows that such words were intended to be used in a more limited sense*. . . ."[43]

The natural reading of this statute is that, except as "the context shows that such words were intended to be used in a more limited sense," Congress intended the term "person" in subsequently enacted statutes to include "bodies politic and corporate." There is no indication in the debates on Section 1 of the Civil Rights Act that Congress

[41] The Act has been described as an instance where "Congress supplies its own dictionary." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 536.

[42] Cong. Globe, 41st Cong., 3d Sess. 1474 (Feb. 21, 1871) (remarks of Rep. Poland, one of the House managers of the bill, reporting on the agreement of the Conference Committee).

[43] Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

intended the "unless" clause to be applicable, nor does the "context show" that such was intended.[44]

2. The sponsors uniformly stated that Section 1 was to extend as far as the Fourteenth Amendment authorized it to go, and nowhere indicated an intention to rein in its sweep short of the municipal treasury. They knew that the prohibitions of the Fourteenth Amendment ("No state shall . . .") applied to municipalities,[45] and they knew

[44] In *Monroe*, the Court deemed the "dictionary act" unpersuasive on the question whether municipalities are "persons," because the "definition is merely an allowable, not a mandatory one." 365 U.S. at 191. Respectfully, we suggest that the Court's construction was not correct. The stated purpose of the "dictionary act" was to "prevent doubt" in the "construction" of statutes. Cong. Globe, 41st Cong., 3d Sess. 1474. If the definitions therein were merely "allowable"—i.e. if the act meant simply that the term "person" "may or may not" include bodies politic or corporate— the act would have created doubt rather than resolved it. Moreover, if that were the construction Congress intended there would have been no reason to include the "in all Acts" and "unless" clauses in the statute. (Significantly, the Court in *Monroe* appears to have overlooked those clauses; the opinion states merely that the statute "provides that the word 'person' 'may extend and be applied to bodies politic and corporate.'" 365 U.S. at 190.) It seems far more logical, given the act's purpose, that it intended that the term "persons" in subsequently enacted statutes *was* to include bodies politic or corporate, except where the act's "unless" clause came into play, i.e., "unless the context shows that such words were intended to be used in a more limited sense." Of course, given the *Monroe* Court's misunderstanding of the debate on the Sherman Amendment (see 30a-32a, *infra*), its ultimate conclusion would not have been altered, for on that understanding the "unless" clause would have been applicable.

[45] Congress had voted for the Fourteenth Amendment only five years before, in 1866, and as this Court has repeatedly recognized, Congress meant the prohibitions of Section 1 thereof to apply to municipalities. *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *Home Telephone and Telegraph Co.* v. *Los Angeles*, 227 U.S. 278 (1913); *Lovell* v. *Griffin*, 303 U.S. 444, 450 (1938). Lest any Congressman had forgotten this by 1871, Representative Bingham, who had authored Section 1 of the Fourteenth Amendment, reminded his colleagues during the 1871 debate that he had used the "No state

that municipalities did not enjoy the protection of the Eleventh Amendment.[46] If they had intended to "protect

shall" formulation for the precise purpose of overruling the Supreme Court's decision in *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243 (1833), a case in which, he explained, "the *city* had taken private property for public use, without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States." Globe App. 84 (emphasis added). Bingham explained further that he had copied the words "No state shall . . ." from Article I, Section 10 of the Constitution, the Impairment of Obligations of Contracts Clause. *Id.* In 1867, four years prior to the 1871 debate, this Court had ruled that the latter clause bound municipalities equally with the states, and affirmed a writ of mandamus compelling municipal officers to levy taxes if necessary to honor the contract sought to be impaired. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 554-555 (1867). The equation in the impact of the two clauses upon municipalities is discussed at length in *Home Telegraph*, *supra*, 227 U.S. at 295-296.

[46] During the 1860's this Court issued innumerable decisions enforcing judgments against municipalities for defaulting on their bond obligations. See, e.g., *Knox Co.* v. *Aspinwall*, 24 How. 376 (1861); *Gelpcke* v. *Dubuque*, 1 Wall. 175 (1864); *Riggs* v. *Johnson Co.*, 6 Wall. 166 (1868); *Von Hoffman*, *supra*; *Butz* v. *Muscatine*, 8 Wall. 575 (1869). These decisions were a subject of great national notoriety after the Civil War, for municipal officials in some states defied federal court orders and risked imprisonment. Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, Part I* (MacMillan 1971), pages 920-1095, and the 1871 Congress was aware of them. See, e.g., Globe App. 314-15 (Rep. Burchard); Globe 751-52 (Rep. Shellabarger); Globe 777 (Sen. Sherman). These cases could not have been brought in federal court had municipalities been protected by the Eleventh Amendment, for the immediate purpose of that Amendment had been to overrule *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), which had upheld federal court jurisdiction over bondholder actions against states. *Edelman* v. *Jordan*, *supra*, 415 U.S. at 660-662. It was not until 1890 that a municipality even *asserted* the Eleventh Amendment as a defense, and the Court, rejecting the defense out of hand, observed that "the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the federal courts in such suits has become established." *County of Lincoln* v. *Luning*, 133 U.S. 529, 530 (1890).

municipal treasuries," as the court below assumed, would they not have said so?

IV.

The lone question remaining is whether the subsequent congressional consideration of the *other* provisions of the bill, and particularly of the Sherman Amendment, alters the understanding of what Congress intended in Section 1.

The Senate bill, as noted, had added the Sherman Amendment, as Section 7, without debate. The Amendment dealt with one subject only: it made "the inhabitants of the county, city or parish" liable "to pay full compensation" to any person injured by certain acts of private violence within the municipality's borders. It was to be enforceable by suit "against said county, city or parish," and if judgment were obtained the plaintiff was authorized to execute the judgment by levy "upon any property, real or personal, of any person in said county, city, or parish."[47]

[47] The full text of the Sherman Amendment as passed by the Senate was as follows (Globe 663):

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a

The House refused to concur in the Senate's amendments to the bill, which included creation of a jury oath as well as addition of the Sherman Amendment.[48] The only references to the latter were a declaration by one member that it was "most obnoxious"[49] and by another that it "should be passed with the silence of death and the grave."[50]

The Conference Committee recommended a revised Sherman Amendment, which removed the liability of the inhabitants of counties, cities and parishes and substituted direct liability of these municipalities.[51]

judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction."

[48] Globe 725.

[49] Globe 723.

[50] Globe 724.

[51] The full text of the revised Sherman Amendment, as recomended by the Conference Committee, was as follows (Globe 749):

> "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part,, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was

The Senate took up consideration of the report, and as the Amendment had not been debated originally this was the first occasion for its proponents to explain its purpose. Senator Edmunds explained that it was designed, in part, to impose "some little obligation upon the part of the communities in which these tumults should occur, to see that justice was done and properly protected."[52] He reasoned that,

> "given the . . . duty of the authorities of the localities to protect people in the way and to the extent that the Constitution says they shall protect them, that it must follow that he who refuses that protection or denies it, be he a principality, or a city, or a nation, if you please, is bound, if there is any value in the law at all, to make good the injury which the citizen who is committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment."

[52] Globe 756. See generally *City of Chicago* v. *Sturges*, 222 U.S. 313 (1911) (rejecting city's Fourteenth Amendment challenge to state statute similar to Sherman Amendment).

titled to that protection suffers; in other words, to bear the consequences of his own default."[53]

In a colloquy with Senator Conkling, Senator Edmunds agreed that the bill was "saying" to municipalities:

> "You, a parish, are bound to preserve the peace and enforce the provisions of the Constitution of the United States, and when you fail so to do, we deal with you directly."[54]

Senator Sherman confirmed that this was the Amendment's purpose, and declared that Congress had as great a power as a State to impose this policing duty upon municipalities:

> "If a State may, to secure the peace and quiet and good order of its citizens, pass a law making a county or a portion of the people responsible for a riot in order to deter such crime, then we may pass the same remedies and use the same means to enforce and secure to our citizens the rights conferred in the Constitution of the United States."[55]

This conception of congressional power—that Congress could charge municipalties with the affirmative obligation to protect federal rights against private interference, and punish the municipalities' failures to carry out that obligation—did not offend the Senate. The conference report was approved by a 2-1 margin in the Senate, on a straight "party line" vote. With one exception, the opposing votes were cast by Senators who voted against the final bill even after the Sherman Amendment was removed.[56]

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[53] Globe 757.

[54] *Id.*

[55] Globe 760. See also Globe 761.

[56] Of the 16 senators who voted against the Sherman Amendment (Globe 779), only one (Fenton) voted for the final bill following removal of the Sherman Amendment (Globe 831).

A different fate awaited the conferees' redraft of the Sherman Amendment in the House. The difference was that a number of Republicans in the House, who supported the bill generally, did not believe that Congress had constitutional authority to hold municipalities accountable for refusing to exercise police powers. In their view, the Constitution left the police power with the states, and it was thus for the states to decide whether, and to what extent, that power should be delegated to subordinate agencies. In fact, they said, many municipalities did *not* have police powers, and those which did held them at the will of the state. For Congress to make municipalities accountable for failing to police private misconduct thus constituted an impermissible interference with the internal affairs of the states in an area which the Constitution left entirely with the states.[57]

Objections reflecting the same constitutional concern had been raised by the same Republican Representatives, in a different context, when the bill was first before the House. Sections 2, 3 and 4 of Representative Shellabarger's original bill had contained language which these members thought trespassed on the states' reserved police power, and they had successfully battled for amendments to those sections to remove the objectionable matter.

Representative Garfield had presented a learned argument respecting the improper encroachment which he believed these sections made upon States' police powers,[58] and he declared that:

> "Amendments have been prepared which will remove the difficulties to which I have alluded; and I trust that my colleague [Mr. Shellabarger] and his Committee will themselves accept and offer these amendments."[59]

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[57] We document these matters *infra*, pp. 23a-31a.

[58] Globe App. 149-155.

[59] *Id.* at 153.

They did; Sections 2, 3 and 4 were amended by Representative Shellabarger.[60] With these changes, those Republicans who had been troubled were satisfied and returned to support of the bill. Representative Poland explained what the changes accomplished:

> "I was opposed to the bill which was brought in by the committee, because I thought it gave the power to the General Government, to Congress, to go down into the States and legislate for the punishment of ordinary offenses against person and property. I did not believe, I do not now believe, that the Constitution, as amended, gives us any such power. The Constitution originally left to the State the administration of the local law, both civil and criminal; all offenses against person and property were to be punished by the State authorities.
>
> I do not agree that the fourteenth amendment or any amendment has changed that, except to this extent: the last clause of the fourteenth amendment provides that no State shall deny the equal protection of the laws to its citizens. Now, in my judgment, that is a constitutional enactment that each State shall afford to its citizens the equal protection of the laws. I cannot agree with several gentlemen upon my side of the House who insist that if the State authorities fail to punish crime committed in the State therefore the United States may step in and by a law of Congress provide for punishing that offense; I do not agree with those gentlemen.
>
> But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out

[60] Globe 477-478.

> this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States."[61]

The concern that the reserved police power of the State not be invaded had been shared by Representatives Willard,[62] Farnsworth,[63] and Burchard.[64] See also Blair.[65]

It was these Republicans who had objected to the encroachment of the original sections 2, 3 and 4 upon State police powers who raised the same objections when the Conference Committee reported the Sherman Amendment. That Amendment, in a different way, equally invaded the States' police power, for, as its sponsors had boasted, it was intended to bypass the States, impose policing duties directly upon municipalities, and hold those municipalities monetarily accountable should they fail to assume those duties.

The first Republican to speak against the Sherman Amendment was Rep. Willard. His objection was that

[61] Globe 514.

[62] Globe App. 187.

[63] Globe 513.

[64] Globe App. 313-315.

[65] Globe App. 73.

Congress, lacking the power to invest municipalities with police powers, should not (perhaps could not) impose liabilities upon municipalities for not exercising police powers. He explained that many municipalities had not been granted police powers by the States, and that those which had might lose them at any time if the State so chose. In his view, it would be wrong for Congress to impose monetary liability upon municipalities for failing to exercise powers which they did not possess, or which they possessed wholly by leave of the States. His analysis stated succinctly the constitutional concern shared by his Republican colleagues:

> "[T]he State, within its boundaries, has the creation and the control of the laws for the protection of the people. What can the county do? What can the parish do? What can a city do, to give me the equal protection of the laws? The city and the county have no power except the power that is given them by the State. They cannot keep violence away from me; they cannot protect me in my rights, except as the State has clothed them with the power to do so; and for the enforcement of the laws of the State they get no aid, no authority, no power whatever from the United States.
>
> "In most of the States—it is so in mine, I know—the counties and the towns have no power whatever in this regard except as those powers have been conferred upon them by the State; and these powers can be taken from them at any time by the State. If these powers are not given to them by the State, if they hold them only at the will of the State, what justice is there in making the town, city, or parish liable for not protecting the property of citizens, when perhaps no laws for its protection exists; for not giving me protection, when they have not been clothed by the State with the right and power to give me protection?

> "Thus it seems to me—and, as I said before, I am only arguing this point in the light of its justice, and not as a strict question of constitutional law—that we are imposing upon a community an obligation that we have no right to impose upon them, that in justice we cannot impose upon them for the reason that such municipalities are, as such, powerless to either make or enforce the laws of the State or of the United States. We should never impose an obligation upon a community when we do not and cannot give that community the power to discharge that obligation. We should not require a county or a city to protect persons in their lives or property until we confer also upon them the power to furnish that protection.
>
> "I hold that this duty of protection, if it rests anywhere, rests on the State, and that if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought home to the State. Hence, in my judgment, this section would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State."[66]

Representative Poland similarly found the Sherman Amendment defective because it purported to impose a liability where Congress had no power to impose the duty the neglect of which was to give rise to that liability:

> "The principle of this law is taken from the old hue and cry or hundred law . . . When property was taken in a hundred all the officers and all the inhabitants

[66] Globe 791.

were immediately to make hue and cry, on foot and horse, for the purpose of arresting the offender . . . It was made the duty by law of the officers of the hundred and all the inhabitants of the corporation to arrest the offender. If they arrested him that was the end of their liability . . . All those statutes, instead of being like this, enact this provision as a part of the police system. The first thing is to provide officers, prescribe their duties, and they may call everybody within their jurisdiction out and help put down the riot. If they fail to put down aggression upon the right of the people, for their neglect they may be made liable to the extent of damages done to property." [67]

The absurdity of imposing the liability for non-policing where Congress lacks the authority to impose the obligation to police was highlighted by Poland in these terms:

"But what would be thought of a national law which should impose a penalty upon the town in which a successful smuggler lived, or where an illicit distillery should be run, or give an action against the town for the loss of the Government in duties or taxes, by such operations? But it would equally be in the power of the national Government to do this as to enact this Senate amendment. I say again, it seems to me that legal gentlemen who support it cannot have given it proper thought." [68]

Representative Blair, too, focused upon Congress' lack of power to impose policing obligations upon municipalities:

"That amendment claims the power in the General Government to go into the States of this Union and

[67] Globe 794.

[68] *Id.*

lay such obligations as it may please upon the municipalities, which are the creations of the States alone. Now, sir, that is an exceedingly wide and sweeping power. I am unable to find a proper foundation for it.

. . . [H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to. The parallel of the hundred does not in the least meet the case. The power that laid the obligation upon the hundred first put the duty upon the hundred that it should perform in that regard, and failing to meet the obligation which had been laid upon it, it was very proper that it should suffer damage for its neglect. This is all there is of it.

"I have learned, sir—perhaps I have some old-fashioned prejudices—that in the Government of the United States there is a division of powers; that there are certain rights and duties that belong to the States, that there are certain powers that inhere in the State governments. They create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, I ask gentlemen to tell me where its power will stop and what obligations it might not lay upon a municipality. If gentlemen say that the powers of the General and of State governments for the protection of life, liberty, and property are concurrent and that we can go everywhere throughout the United States and do by the General Government everything that can be done by any State government, then I grant that this power might exist; but until I am shown that, I am unable to see it . . . I must say that I think that if we have the right to lay this obligation upon them, to require them to meet these damages, it must draw after it the

power to go in there and say, 'you shall have a police, you shall have certain rules by which you may fulfill your obligation in this respect'."[69]

Representative Burchard noted that many municipalities had not in fact been delegated policing functions by the States, and declared that Congress lacked constitutional power to impose policing obligations upon municipalities when the States had not:

> "But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person. Police powers are not conferred upon counties as corporations; they are conferred upon cities that have qualified legislative power. And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by State laws, perhaps the United States courts could enforce its performance . . . But still in few, if any, States is there a statute conferring this power upon the counties. Hence it seems to me that these provisions attempt to impose obligations upon a county for the protection of life and person which are not imposed by the laws of the State, and that it is beyond the power of the General Government to require their performance."[70]

[69] Globe 795.

[70] Globe 795. The quotation in the text contains one sentence which is ambiguous: "And so far as cities are concerned, where the equal protection required to be afforded by a State is imposed on a city by State laws, perhaps the United States courts could enforce its performance." In context, this sentence is completely consistent with our position, and with the central theme of Representative Burchard's remarks, that where a state delegates certain of its powers to a municipality, that municipality is bound when it exercises those powers to abide by the requirements of the Fourteenth Amendment. See also Globe at 791 (Rep. Willard). We recognize, however, that literally and in isolation it could be read to mean that no municipality is bound by the requirements of the Fourteenth Amendment unless the state chooses to make it so bound. In this connection, it is important to remember that statements made in these debates were often off-the-cuff, with loose and sometimes confused language. Thus, in analyzing these debates, it is critical to determine basic themes rather than to rely on random and isolated statements.

Representative Bingham, declaring that "the only power to charge a municipality for the destruction of property by a mob arises from the laws of the state," concluded that "a county, being the creature of the State and an integral part of it, can in no case be made responsible for mob violence save by force of the positive law of the State creating it."[71]

Finally, Representative Farnsworth repeated the theme—no obligation, no liability:

> "Congress can . . . impose no duty on a sheriff or any other officer of a county or city. We cannot require the sheriff to read the riot act or call out the *posse comitatus* or perform any act or duty. Nor can Congress confer any power or impose any duty upon the county or the city. Can we then impose on a county or other State municipality liability where we cannot require a duty? I think not."[72]

The House thereupon voted to reject the Conference Report, by a vote of 106-74.[73] Twenty-three supporters of the bill as a whole voted against the Sherman Amendment,[74]

[71] *Id.* at 794.

[72] *Id.* at 799.

[73] *Id.* at 800.

[74] Compare Globe 800 (vote on Sherman Amendment) with Globe 808 (vote on the final bill following removal of the Sherman Amendment). Had these 23 supported the Sherman Amendment, it would have been approved by a margin comparable to that which approved the final bill.

and their defections spelled the difference between defeat and victory for the Amendment. Of the 23, only the six we have quoted explained the basis for their opposition; but it is clear that others shared their concerns about the Amendment's encroachment upon the States' reserved police powers.[75]

The House's rejection of the Conference Report necessitated another conference, at which the Sherman Amendment was scrapped and the present 42 U.S.C. § 1986 substituted (making persons who have knowledge of an impending riot affecting federal rights liable to injured victims for failing to take whatever steps are in their power to prevent or aid in preventing the riot).[76]

Representative Poland, who had been one of the conferees, reported to the House the arguments which had persuaded the Senate conferees to recede from the Sherman Amendment. This passage is the *only* item of legislative history addressed to the status of municipalities quoted or cited in *Monroe:*

> "I did understand from the action and vote of the House that the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law. We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that the section imposing liability upon towns and counties must go out or we should fail to agree."[77]

[75] Thus, for example, four others among the 23 defectors had previously expressed concern about the bill's possible encroachment upon the state's police powers, in the context of the successful effort to amend Sections 2, 3 and 4. Rep. Garfield (Globe App. 149-155); Rep. Cook (Globe 478); Rep. Hawley (Globe 382); Rep. Sheldon (Globe 368).

[76] *Id.* at 804, 819-820.

[77] *Id.* at 804.

In *Monroe,* the Court apparently understood the word "obligation" in Representative Poland's report to mean "*financial* obligation," so that the gist of his statement was thought to be that there was a doubt as to Congress' "constitutional power to impose any [financial] obligation upon county and town organizations." It is plain, however, when the full debates are read, that Representative Poland meant "affirmative obligation," and that the full gist of his remarks was that there was a doubt as to Congress' "constitutional power to impose any [affirmative] obligation upon county and town organizations," and accordingly an unwillingness to impose a "liability" for non-performance of a duty [an "obligation"] which Congress could not require municipalities to perform.

V.

Correctly understood, the objections which led to the defeat of the Sherman Amendment were totally irrelevant to Section 1 of the bill. Section 1 imposed no obligations on "persons." It provided only that "persons" could be held liable for violating those obligations which the Fourteenth Amendment already imposed upon them; in the case of municipalities, the obligation to refrain from doing what "No state shall" do. Including municipalities under Section 1 thus constituted no invasion of the States' reserved powers. States retained their sole right to determine what functions, if any, they would delegate to municipalities. The Fourteenth Amendment already provided that in exercising *whatever* functions the states delegated to them, municipalities were required to refrain from denying due process, denying equal protection, etc. Section 1 merely made these existing obligations enforceable in federal court.

With the full legislative debates properly understood, two conclusions follow:

1. The holding in *Monroe* was erroneous. *Monroe* drew an inference that Congress meant to exclude municipalities

from the term "persons" in Section 1 *solely* from its misconception as to the reason for the defeat of the Sherman Amendment, 365 U.S. at 191:

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."

But however erroneous, this holding may be deemed to be *stare decisis.*[78]

2. *Monroe* did not, however, decide the issues posed in the instant case; it cannot be *stare decisis* as to them. We have shown that Congress did *not* have a desire to "protect municipal treasuries" against the cause of action created in Section 1. Congress erected no "shield" against the Fourteenth Amendment "sword." There is no Eleventh Amendment "analogy." There is nothing which stands in the way of effectuating the clear congressional will to make Section 1 reach as far as the Fourteenth Amendment allows it to go. The statute authorizes a federal court order requiring wrongdoing public officials to exercise "the power that is theirs" to provide *all* relief—including retroactive monetary relief from the public treasury—necessary "to make good the wrong done."

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[78] Cf. *Monroe*, 365 U.S. at 218-223 (Frankfurter, J., dissenting).